No. 336.

Brief of Clerk for Appellee

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IN THE

SUPREME COURT

OF THE UNITED STATES.

October Term, 1897.

No. 336.

JOHN W. BAKER, SHERIFF, ETC., APPELLANT,

vs.

WILLIAM GEICE, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF OF APPELLEES.

JOHN D. JOHNSON,
GEO. CLARK,
B. C. BOLINGER,
Of Counsel for Appellee.

J. M. SHARP, PRINTER AND STATIONER, WACO.

—IN—

THE SUPREME COURT

OF THE UNITED STATES.

October Term, 1897.

No. 758.

JOHN W. BAKER, SHERIFF McLENNAN COUNTY, TEXAS, APPELLANT,

VS.

WILLIAM GRICE, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The appellee is not able to concur in the statement of the case as presented by appellant in his brief, in that in the judgment of appellee such statement of the case by

appellee does not present a full history of the case. Appellant, therefore, submits the following statement of the case:

This appeal is from a judgment of the Circuit Court of the United States for the Northern District of Texas, rendered on a writ of habeas corpus duly issued by said Court upon the application of appellee on December 9, 1896, while said Court was holding its term at Waco, in the State of Texas. (R. pp. 65-66.)

The petition for said writ of habeas corpus set forth that petitioner was a citizen of the United States, and resided in the County of Dallas and State of Texas; that petitioner was unlawfully restrained in his liberty by appellant, Baker, who was the sheriff of McLennan County, Texas, and was held in the custody of said sheriff, petitioner having been surrendered by his sureties under a recognizance taken in the State Court; that petitioner was detained by virtue of a capias issuing out of the District Court of the Fifty-Fourth Judicial District of the State of Texas at Waco upon an indictment preferred in said Court against petitioner and other citizens of the United States on, to-wit: The 21st day of November, 1894, said indictment and prosecution being numbered on the criminal docket of said Court as number 871, and entitled, "The State of Texas vs. John D. Rockefeller, et al," which indictment charged that John D. Rockefeller, Henry M. Flagler, John D. Archbold, Benjamin Brewster, Henry M. Rogers, Westley H. Tilford, Henry Clay Pierce, Arthur M. Finlay, C. M. Adams, J. P. Gruet, E. Wells, William Grice, F. A. Austin and E. T. Hathaway did unlawfully agree, combine, conspire, confederate and engage with William E. Hawkins and divers other persons to the grand jurors unknown in McLennan county, Texas, in a conspiracy against trade then and there, and with the said William E. Hawkins and said other persons

creating a trust by a combination of their capital, skill and acts with the said William E. Hawkins and other persons for the purpose, design and effect to create and carry out restrictions in trade. (R. 2.) This indictment is set out in full in the record. (R. pp. 8-18.)

Petitioner alleged that said indictment was founded upon an Act of the Legislature of the State of Texas, entitled, "An Act to define trusts and to provide for penalties and punishment of corporations, firms and associations of persons connected with them and to promote free competition in the State of Texas," approved March 30, 1889, which Act was a public law of the State of Texas. (R. 2.) He further alleged his arrest and entry into recognizance before said Court conditioned for his appearance therein from day to day, and from term to term, to answer said indictment, and that thereafter, to-wit: On December 2, 1895, the case was called for trial, whereupon the defendants who had been arrested, to-wit: E. T. Hathaway, William Grice, F. A. Austin, Arthur M. Finlay and William E. Hawkins severed, and in accordance with the laws of Texas, E. T. Hathaway, his co-defendant, was placed on trial; that thereupon said Hathaway, through counsel, filed and presented his exceptions to the sufficiency of the indictment in the nature of a motion to quash as at common law, in which was set up and presented the following causes of exception among other things, to-wit:

3. Because the Act of the Legislature of the State of Texas, of March 30, 1889, aforesaid, was violative of the Constitution of the United States, for the reason that said statute discriminated between different classes of citizens of the United States and denied to certain citizens the equal protection of the law, and proposed to deprive certain citizens of the United States of their

liberty, property, privileges and immunities in a way other than by due course of the law of the land.

6. Because said indictment showed upon its face that the parties presented were engaged in inter-state commerce within the meaning of the Constitution and laws of the United States, and the District Court of the Fifty-Fourth Judicial District had no jurisdiction of any such matters. (R. p. 3.)

The Court overruled these exceptions and thereupon a trial was had before a jury, which resulted in a verdict of guilty as to said Hathaway, on the 12th day of December, 1895, his punishment being assessed at a fine of $50.00, which verdict was received and judgment duly entered, and thereafter the said Hathaway in his motion for new trial and in arrest of judgment, set up the same objections to the constitutionality of said statute as were set up *in limine,* which motions were overruled by the Court and sentence passed upon said Hathaway, from which judgment and sentence appeal was perfected by said Hathaway, to the Court of Criminal Appeals of the State of Texas, on various assignments of error, including the unconstitutionality of said Act of the Legislature. (R. pp. 3-4.)

Petitioner further alleged that under the provisions of the code of criminal procedure of the State of Texas, and of the laws of said State, said conviction was for a felony, notwithstanding the pecuniary fine imposed, and under said laws of Texas the defendant, Hathaway, was not permitted to appeal upon recognizance, but was forced to submit to confinement, pending appeal, in the common jail of McLennan County, Texas; that said appeal was prosecuted with diligence and upon the assignments of error recited; that said appeal was not determined until the 24th day of June, 1896, and in the meanwhile the said Hathaway, co-defendant, was incar-

cerated in the common jail of McLennan County, Texas, in the companionship of thieves and felons awaiting the result of said appeal; that in the decision of said appeal said Court of Criminal Appeals declined and refused to decide upon the exceptions to the sufficiency of the indictment aforesaid, or to pass upon the Constitutional questions raised, although they were assigned for error and duly presented and argued, but decided said appeal upon a technical ground of pleading, holding, in effect, that because the indictment presented in said case had failed to charge Hathaway with having *knowingly* carried out, as agent, the stipulations, purposes, prices, rates or orders of said alleged conspiracy, that no evidence to that effect was admissible, and that the Court erred in admitting any evidence, and for said reason chiefly, said judgment was reversed and cause remanded to said District Court of the Fifty-Fourth Judicial District for a trial *de novo*. (R. pp. 4-5.) The opinion of the Court of Criminal Appeals in said case is set forth at length in the printed record herein. (R. pp. 53-65.)

Petitioner alleged that since the rendition of said judgment by said Court of Criminal Appeals, two terms of the District Court of the Fifty-Fourth Judicial District had been held, one of which was then nearing its close, and that while petitioner, with his co-defendants, had stood ready and anxious for trial, yet the case had not even been called by the Court for trial, nor had it been set for trial, but the same had been permitted to remain upon the docket of said Court, subjecting the petitioner and his co-defendants to the shame of an indictment for felony, but denying to him and them the right to be heard in his defense in said Court as a citizen of the United States, and leaving him and his co-defendants without remedy in the State Courts for the assertion and vindication of their rights under the Constitution of the United States. (R. p. 5.)

Petitioner further alleged that on November 24, 1896, Hathaway, his co-defendant, sued out a writ of habeas corpus before the Circuit Court of the United States for the Northern District of Texas, which writ of habeas corpus on the same day was served upon Baker, appellant, herein, the sheriff, and that he, the said Baker, on the same day made return to said Circuit Court of the United States that he held the body of Hathaway by virtue of a capias issued upon the indictment hereinbefore described, for violation of the Anti-Trust Statute of the State of Texas, enacted and approved on March 30, 1889; that the cause was set for hearing by said Circuit Court of the United States, at Waco, for December 7, 1896, and due notice was issued to the respondent, Baker, and to the prosecuting officers of McLennan County and the State of Texas, duly advising them of such proceedings; that for reasons unknown to petitioner, but for reasons which petitioner believed were obviously for the purpose of defeating the jurisdiction of said Circuit Court of the United States, and preventing said Court from passing upon the Constitutional rights of Hathaway, said prosecuting officers on the day on which the habeas corpus was to be heard in the Circuit Court of the United States, to-wit: December 7, 1896, went into the District Court of the Fifty-Fourth Judicial District, and, with the consent of said Court, dismissed said indictment as to Hathaway, but leaving the same to stand unimpaired and unaffected as to petitioner and the other co-defendants, and thereafter on the same day, to-wit: December 7, 1896, Baker, the appellant, sheriff, filed an amended return to said writ in the Circuit Court of the United States, submitting a copy of the judgment of dismissal in the State Court, and certifying that by reason thereof, he, Baker, had and claimed no further right or custody over the relator, Hathaway, and thereby the jurisdiction of the Circuit Court of the United States was substantially terminated. (R. p. 6.)

That petitioner was advised by counsel and so averred that said Act of the Legislature of the State of Texas, approved March 30, 1889, is violative of the Constitution of the United States for the reasons stated in said exception to said indictment; that said Act discriminates between different classes of citizens of the United States and denies to certain citizens and classes of citizens the equal protection of the laws; that it deprives certain citizens and classes of citizens of the United States of their liberty, privileges and immunities in a way other than by due course of the law of the land; that it otherwise attempts to justify and exercise extra-territorial jurisdiction on the part of the State of Texas over citizens of the United States residing in other States of the American Union, and over acts done in other States of the American Union, and over which the State of Texas can have no possible jurisdiction; and that said Act and the indictment against petitioner was an attempt to interfere with inter-state commerce in violation of the Constitution of the United States. (R. pp. 6-7.) Petitioner alleged by reason of the premises that he was without remedy for the assertion or vindication of his rights as a citizen of the United States under the Constitution; that he had stood under the indictment for felony for a period of two years without being afforded an opportunity in the State Courts of Texas for the assertion of his rights as a citizen of the United States; that he believed and so averred that it was the purpose and intent of the prosecuting authorities of the State of Texas to prevent, if possible, any appeal by him to the Courts of the United States for the vindication of his rights as a citizen; and that without the interposition of said Circuit Court of the United States for his protection and the preservation of his rights as a citizen of the United States, he was practically remedyless by appeal in the regular course or otherwise. (R. p. 7.)

Petitioner prayed for writ of habeas corpus and

attached, as exhibits, to his petition the following papers, to-wit:

1. Copy of the indictment preferred in said cause.

2. Copy of the judgment of the District Court of the Fifty-Fourth Judicial Districts, adjudging Hathaway guilty.

3. Copy of the brief and argument of Hathaway's counsel in the Court of Criminal Appeals of the State of Texas.

4. A copy of the opinion of said Court of Criminal Appeals of the State of Texas. (R. pp. 7-8.)

The writ of habeas corpus was issued, as aforesaid, on December 9, 1896, and on the same day, Baker, appellant, the sheriff of McLennan County, Texas, made return to said Circuit Court of the United States, producing, in open Court, the body of petitioner, appellee, and certifying that he held him in custody by virtue of a capias issued out of the District Court of the Fifty-Fourth Judicial District of the State of Texas, upon an indictment preferred in said Court in a certain criminal case, numbered 871, The State of Texas vs. John D. Rockefeller, et al., which indictment charged him with conspiracy against trade in violation of the Act of March 30, 1889. (R. p. 66.)

On December 11, 1896, on motion of respondent, Baker, appellant herein, the cause was transferred for trial to a term of said Circuit Court of the United States to be holden at Dallas, Texas, on January 11, 1897, and on said last named day appellant, Baker, sheriff, filed an amended return, which is correctly set forth by appellant in his brief. (R. pp. 68-72.)

Appellee filed his replication to said amended return, demurring to portions thereof, and denying other portions. (R. pp. 72-73.)

On February 22, 1897, during said term of said Circuit Court, at Dallas, said Court entered its judgment discharging appellee from custody, for the reasons stated in an opinion filed in said cause, which opinion and judgment may be found in the record. (R. pp. 75-101.)

Respondent, Baker, sheriff, perfected an appeal from said judgment, discharging appellee and assigned errors as stated in appellant's brief.

BRIEF.

There are but two questions to be determined by this Court upon this appeal, which are as follows:

1. Did the Circuit Court of the United States for the Northern District of Texas, err in assuming and exercising jurisdiction by way of habeas corpus in advance of a trial by the State Courts?

2. Is the Act of March 30, 1889, violative of the Constitution of the United States?

These two questions will be discussed herein as an answer to the elaborate brief of appellant's counsel.

I.

ON THE QUESTION OF JURISDICTION.

We submit for appellee the following proposition:

The jurisdiction of the United States Courts and judges to issue writs of habeas corpus in cases where a citizen is illegally restrained of his liberty by State process, either before or after conviction in the State Court, in violation of the rights and immunities conferred upon citizens by the Constitution of the United States, is established and undoubted. The usual course for a citizen so restrained to assert his rights under the Constitution is by appeal from the trial Court

to the highest Court of the State, and thence in case of an adverse decision, by writ of error to the Supreme Court of the United States. This course of vindication should be usually followed. But if for any reason such course is obstructed or is inconvenient, or would involve peculiar hardship upon the relator, then and in that event the jurisdiction should be exercised by the Federal Court to which application is made and prompt and speedy relief afforded the relator.

This proposition, in view of the long line of decisions by this Court, has become *axiomatic*.

Rev. Stat. U. S., Sections 751, 752, 753, 754, 755, et seq.
Ex-Parte Royal, 117 U. S., 241.
Ex-Parte Fonda, 117 U. S., 516.
In re. Coy, 127 U. S., 731.
Ex-Parte Medley, 134 U. S., 160.
Ex-Parte Frederick, 149 U. S., 70.
Whitten vs. Tomlinson, 160 U. S., 231.

The duty of guarding and preserving the Constitution of the United States is one peculiarly devolved upon the Federal judiciary. It is true this Court has said more than once that it must be presumed that State Courts, being Courts of the American Union, would protect all the rights of citizens, whether under the State or Federal Constitution. But this, at best, is but a presumption, perhaps ordinarily correct, but subject, in exceptional instances, to rebuttal like any other presumption. The case at bar is peculiarly a case arising under the Constitution of the United States. It is not an attempt to revise proceedings or decisions of a State Court. It was not attempted, in this case, to make the writ of habeas corpus operate in any manner as a writ of error. No complaint is made by appellee, who was the relator

below, as to any action of the State Courts in the progress of this prosecution except that the highest Court of the State of Texas, having criminal jurisdiction, failed and refused to pass upon or adjudicate the rights of this appellee and his co-defendants as citizens of the United States, under the Constitution thereof, and that he was unable to get a trial. The record here abundantly demonstrates, and without contradiction on the part of appellant, that an honest attempt was made to have the rights of this appellee and his co-defendants under the Constitution of the United States, and as citizens thereof, determined and adjudged by the highest Court of the State of Texas having criminal jurisdiction, in which they were unsuccessful. This record also shows that under the laws of the State of Texas, the crime of which appellee stood charged in the State Court by indictment, was a felony, and that under said laws of the State of Texas, in case of conviction of appellee, he would be forced to lie in the common jail in company with thieves, murderers and other felons and await the result of said appeal, no matter what length of time such decision might be delayed.

Counsel for appellant have endeavored to obscure the issue as to jurisdiction by a lengthy argument directed to the point that appellee has never had a trial; that his case is entirely distinct from that of Hathaway; that he has never made any attempt to present to the State Court his defenses as to the unconstitutionality of the Act of March 30, 1889, and a great deal more upon that line. Counsel should not mistake the issue nor endeavor to mislead the Court as to the issue. Hathaway has been eliminated from this case. He was indicted originally with appellee and others, submitted to conviction, appealed his case. The conviction was reversed. The State Court refused him another trial. He applied to the United States Circuit Court for his writ of habeas

corpus, and on the day such writ was to be heard the prosecuting officers of the State, as alleged in the petition for habeas corpus, procured a dismissal of the prosecution as to him, for the very purpose of preventing an appeal to the Circuit Court of the United States, or a decision as to the constitutionality of such statute. As said before, this is not a procedure for the purpose of reviewing the action of the State Court in the Hathaway case. It is not a procedure for the purpose of enabling the United States Circuit Court to determine whether the State Court did right or did wrong. The question is simply this: Has the appellee and his associates made an honest attempt in the State Court to have their rights adjudicated under the Constitution of the United States, and have they failed in such attempt? coupled with the further question: Do the facts at bar show a case of peculiar urgency, justifying a Court or judge of the United States upon a writ of habeas corpus, to determine the validity of appellee's arrest and detention? The substantial facts stated in the application for the writ are not denied by the return. It is not denied that these appellees here together with Hathaway, were indicted as charged; nor that such indictment was based upon the Anti-Trust Act of the State of Texas, of March 30, 1889; nor that these appellees were arrested; nor that Hathaway was tried and convicted; nor that he, by his counsel, in behalf of himself and these appellees, raised objections to the constitutionality of said statute, which were determined against him in the trial Court; nor that he appealed his case to the Court of last resort in the State of Texas in criminal matters, and again urged his objections to the constitutionality of said statute; nor that the Court of Criminal Appeals failed and refused to decide the question, though practically deciding it adversely to appellee by remanding the case for trial *de novo;* nor that the appellee and his associates have ever since said reversal

and during two terms of said State Court stood ready and anxious for trial dancing attendance upon said State Court, from day to day and from term to term in accordance with the requirements of their several recognizances; nor that said State Court refused to bring them to trial; nor that said case against appellee was never called for trial. These facts are incontrovertible. The question is, do they present a state of facts which would justify a Federal Court in intervening by writ of habeas corpus in order to vindicate rights of citizens of the United States under the Constitution of the United States?

Counsel for appellant also misstates the decision of the Court of Criminal Appeals of the State of Texas. It is true that said Court decided that the State, by its testimony, on the trial of Hathaway, failed to reach defendant with any evidence even tending to show that he was an original conspirator, or that he entered into a conspiracy in restraint of trade (R. p. 62;) but the gist of the decision was placed by that Court upon a different ground, to-wit: That it was developed that Hathaway and appellee were mere agents of the Waters-Pierce Oil Company in Texas, and the indictment having failed to charge said agents with having *knowingly* assisted in furthering the purposes of the trust, no evidence was admissible thereunder against them, such indictment being fatally defective. The language of the Court is thus: "If appellant, (Hathaway), had acted as an agent for the conspiracy, with full knowledge of its purposes, and proof had been made of this fact, he could not be convicted under the allegations of this indictment. To hold him responsible as an agent, the indictment must allege the fact that he knew of the conspiracy and its purposes." (R. p. 63.)

The immensity of space covered by counsel for appellant in discussing the assumption, not justified by the

record, that the Hathaway case was reversed because the evinence did not support the finding of the jury, is not tenable. The reversal, as stated above, was upon a different ground, and the argument of appellant upon that branch of the case falls to the ground. With the light of this opinion of the Court of Criminal Appeals before them, the prosecuting authorities of the State of Texas, and the judge of that State Court still held to this indictment and still refused to try the defendants, including this appellee. This is not denied. They are charged with knowledge derived from this opinion that they could not convict appellee under that indictment, for this was settled by the opinion. Notwithstanding this fact, they made no attempt to find a new indictment, nor any effort to bring to trial these parties, defendant. They left them to stand in the pillory of public condemnation under an indictment for felony, and as said before, required to dance attendance, from day to day and from term to term, without any prospect of securing their release or of even securing the right of appealing to this Court by writ of error from a decision of the highest Court of the State; because it goes without saying that without a trial in the lower Court there could be no appeal to the Court of Criminal Appeals of the State of Texas. Yet the counsel for appellant derides the case as made and stigmatizes it as a travesty upon justice and absolutely assumes that the time of the United States Circuit Court was uselessly consumed in determining the rights of an American citizen under the Constitution of the United States, because other causes may have been pressing for a hearing. The Constitutional rights of an American citizen seem to be of small concern to counsel for appellant, and the liberty of the citizen under the Constitution, a bagatelle. The idea may be antiquated, but still it obtains with great force with counsel for appellee, that these are the most important questions

that could come even before this high Court, far surpassing in importance any cause involving mere money or property. This appellee did not rush into prison in order that he might get this Court to determine whether a certain State statute is valid, and in the meantime delay all further proceeding by the State Court, but he rushed into a Court of the United States as soon as he ascertained that the State Courts did not intend to afford him protection and vindication. He came to the constituted tribunals of the country, especially organized for the administration of the Constitution and laws of the United States, and the protection of the rights and liberties of citizens of the United States, but he did not come until the acts and doings of the State Courts and State officers admonished him that he was without hope of remedy in State tribunals. The character of trial he could justly anticipate in the State Court, if he ever got one, is beautifully illustrated in the argument of the State's attorney, in Hathaway's trial. (See Record pp. 41-53.)

The leading case of Ex-Parte Royal upon this question of jurisdiction needs no comment in this Court. It establishes most clearly and succinctly the jurisdiction of the Circuit Court of the United States, to furnish the relief prayed for in this instance, and we have searched in vain for any opinion of this Court which qualifies the principles established in the Royal case. Whitten vs. Tomlinson, (160 U. S., 231,) seems to be relied upon by counsel for appellant, as having qualified and restricted the meaning and intent of the Royal case, but we do not so consider it, and the two cases seem to be in perfect harmony. The instances cited by the learned justice who delivered the opinion in the case of Whitten vs. Tomlinson, are not restrictive, but merely illustrative, going to the extent of holding as was held in the Royal case, more as a matter of comity than otherwise,

the rule had been established by the decisions of this Court that a prisoner in custody under the authority of a State should not, except in a case of peculiar urgency, be discharged by a Court or judge of the United States, upon a writ of habeas corpus, but that he should be remitted to the ordinary procedure, to-wit: An appeal to the highest Court of the State, and thence by writ of error to this Court. But it is to be noted that the opinion in the last named case at its conclusion contains most significant language. The learned justice says:

"There could be no better illustration than this case affords, of the wisdom if not necessity of the rule established by the decisions of this Court above stated that a prisoner in custody under the authority of a State should not, except in a case of peculiar urgency, be discharged by a Court or judge of the United States, upon a writ of habeas corpus *in advance of any proceedings in the Courts of the State to test the validity of his arrest and detention.*"

The record shows in this case a case of peculiar urgency, and it shows that the discharge of appellee by a Court of the United States, upon a writ of habeas corpus, was not in advance of any proceedings of the Courts of the State to test the validity of his arrest and detention. To the contrary, appellee submitted to the jurisdiction of the State Court, for more than two years, without complaint. He and his associates made every effort in the State Courts to test the validity of his arrest and detention, because the decision of the Hathaway case as to the Constitutional question involved, was necessarily a decision of the case of appellee. The two were inseparable. If Hathaway was entitled to his discharge by reason of the Constitutional objections to the statute in question, necessarily the discharge of appellee followed as an inevitable conclusion. They were indicted together for the same offense. They were

both agents of the Waters-Pierce Oil Company. The indictment was fatally defective as to both. There could be no conviction of either in the State Courts upon said indictment, but still the authorities of the State of Texas held them in durance vile without an effort to bring them to trial. But to the contrary, as is apparent from the record, a studious determination not to let them have a trial. How long must an American citizen be denied his right to an adjudication as to the validity and legality of his imprisonment? How long must an American citizen dance attendance upon a State Court, and await its pleasure in the adjudication of his right to liberty?

The urgency in this case is further best illustrated by the fact that, in the opinion of the Court of Criminal Appeals, (R. pp. 53-65), that Court, in refusing to pass directly upon the Constiutional questions, employed this language:

"There are some Constitutional questions raised in this case. Some of the questions have been before our Supreme Court and it has been decided by that tribunal that the law in question is Constitutional. It is claimed by the appellant, however, that the decision is obiter, and, moreover, that the decision of the question by that tribunal is not binding upon us. While the presumption will be indulged that the decision of the Supreme Court is correct, yet a discussion and decision of the question in the view we have taken is not necessary in determining this case. This question has been before the Supreme Court in the following cases: Anheuser-Busch Brewing Association vs. Houck, 27 S. W. Rep., 696; Houck & Deiter vs. Anheuser-Busch Brewing Association, 88 Tex., 184; T. & P. Coal Co. vs. Lawson, 34 S. W. Rep., 919, and Walsh vs. Windmill Co., recently decided.

Because the Court charged on a phase of the case not supported by any allegation in the indictment, and because the evidence wholly fails to sustain this verdict, the judgment is reversed and the cause remanded." (R. pp. 64-65.)

The first and leading case decided by the Supreme Court of Texas, upon the question, is Anheuser-Busch Brewing Association vs. Houck, 30 S. W., 869. This case arose in one of the counties of the Fourth Supreme Judicial District; in passing upon that case on appeal, the Court of Civil Appeals, for that district, used this language:

"The constitutionality of the Act of 1889 is not raised in the brief, and we perceive no objection to it in that respect. The question was raised in the case of Insurance Company vs. The State, (24 S. W. Rep., 397), but was found not necessary for its decision. The objection there pointed out, which seems to be the only one to suggest itself, is the clause exempting from its provisions, all agricultural products and live stock while in the hands of the producer. This is said to make the Act class legislation. It is apparent that all persons of every class, upon whom the Act proposes to operate, are treated without distinction. This feature of a general statute is held to be the test of whether it is or not obnoxious to that objection, and we believe the Act to be valid. Railway Co. vs. Mackey, 127 U. S., 205."

In passing upon the case, on writ of error, the Supreme Court of Texas used the following language:

"For the reasons given by the Court of Civil Appeals, we also agree with them, in holding that the Act is not in violation of the Constitution." (30 S. W. Rep., 869.)

It will be perceived from this that the Supreme Court of Texas decided that the statute was constitutional

without argument, and without the question having been raised by counsel. A similar condition of affairs confronts us with reference to the other Texas cases cited by appellant on page 67 of his brief. In T. & P. Coal Co. vs. Lawson, 34 S. W. Rep., 919, the Supreme Court of Texas went to the extent of holding that a landlord, in case he rented a tenement to a party for the purpose of putting up a saloon, could not enter into partnership with him, in effect, unless he permitted everybody else who wished to, to come upon his land and put up a saloon. Otherwise he was creating a monopoly which was violative of the Texas statute.

So appellee was confronted with this condition of affairs. The question of the constitutionality of the Act of March 30, 1889, had been repeatedly sustained by the Supreme Court of Texas, and was not then an open question in that Court; said Court being the highest Court in civil matters in that State. The Court of Criminal Appeals, which is the Court of last resort in criminal matters, indulged the presumption that the decision of the Supreme Court was correct, and remanded the case for a new trial, notwithstanding the constitutional objections, which was, in effect, a decision adverse to the contention of appellee. While the road of appellee to this high Court may not be said to have been absolutely blocked, yet this condition of affairs amounted practically to the same thing. Under such condition, even had appellee been able to get a hearing in the trial Court, which was denied him, he must perforce have anticipated a similar result upon trial to that accorded Hathaway, his co-defendant; for if said trial Court was pleased to hold Hathaway guilty of felony, when the Court of last resort in criminal matters held that there was not a line of evidence against him, connecting him in any manner, with the trust, what hope could appellee have of another and different decision in

his case? He was called upon to assume, as a fact, that he would be convicted, even if his urgent appeals for a trial should result in securing it. He was then confronted with the further fact, that in case of conviction, he must perforce lie in jail pending appeal to await the result of such appeal in the Texas Courts. Possibly his case might have been reversed like Hathaway's, but this would only have protracted the delay. In case of the affirmance of the judgment of conviction, his remedy as is insisted upon by counsel for appellant, was to remain in jail and come before this Court praying for writ of error from the State Court. This not only takes time, but requires a large expenditure of money. The record shows that appellee was an employe on a salary, and it is to be presumed that he was not possessed of much of this world's goods. So disgrace and imprisonment were inevitable in order to reach what ought to be accessible, most readily, to every American citizen, to-wit: The right to have his privileges and immunities determined under the Constitution of the United States. Apart from this, vast pecuniary and property interests are involved in this determination. The rights of citizens of the United States, under the Constitution, to enjoy equality of trade and privilege with other citizens of Texas, are involved. The liberty of every citizen of the United States is involved. The interests of inter-state trade and commerce is involved. And yet it is seriously contended by counsel for appellant, that notwithstanding all these vast interests, notwithstanding the inevitable suffering and disgrace of appellee, and notwithstanding the determination manifest in the record on the part of the State authorities not to give him a trial, nor permit him to set up in the State Court his rights as a citizen of the United States, under the Constitution, yet his case is a fictitious case involving no urgency, and deserving of reprobation at the hands of this Court.

We can find no better language to express our idea of

the law, governing this particular question, than that employed by a distinguished justice of this Court, while on the circuit, which language is as follows:

"Therefore, it is often the proper way to decline to allow the writ, leaving the party to enforce his rights in the State Courts. So it is argued that if it be true that these ordinances are in conflict with the Federal Constitution, the petitioner has his remedy. He can appeal his case from the Police to the District Court; from there to the Supreme Court of the State; and thence to the Supreme Court of the United States. While that is true, yet he has no adequate relief in that way. He is now under sentence, and he cannot appeal without bond. He will be subjected to trial in the District Court, possibly to an inquiry in the Supreme Court of the State, and, finally in the Supreme Court of the United States. He must bear the expense and suffer the delay. This is not a case prior to trial and judgment; it is a case after trial and judgment. He has experimented with the State Court and it has decided against him. While he has, of course, the right of appeal, yet this is a burden, and personally, to him, it is an inadequate protection to say, 'You can appeal and go through that channel to the Supreme Court of the United States.'

"But that is not the only consideration. If these ordinances are invalid, they are invalid because of an attempt to interfere with commerce and prevent the free exchange of commodities between the citizens of another State and those of this city. Few persons can stand the expense of litigation running through that channel to the Supreme Court. Length of time would pass before the judgment of that Court could be obtained. In the meantime, if these ordinances are enforced, not only against petitioner, but against whoever may see fit to engage in this business, there is an interference with the exchange of commodities between citizens of other

States and those of this city, and the result will be to stop such traffic. Now, when that would be the natural result, and that is declared to be the intent, perhaps, of this legislation, this Court may, in the exercise of its discretion, properly hold, after a case has passed to judgment in the State Court, that the party has a right to a speedy inquiry and determination in the Federal Court as to whether such ordinances are in conflict with the Constitution of the United States. The public, as well as the individual, are interested in the speedy settlement of this matter." (Mr. Justice Brewer, in Ex-Parte Kieffer, 40 Fed. Rep., 400.)

It is worthy of note that in the above cited cause the learned justice considered that the fact that the relator should be required to give bond, pending appeal, was a sufficient burden to justify the interposition of a Federal Court. How much more strongly is the case at bar, in which not even the poor privilege of bail would be allowed appellee, in case of such appeal? In this case, as in that, the State Court has been experimented with and it has decided against the appellee. If appellee's contention be correct, the statute is utterly void for unconstitutionality, and if the Court of Criminal Appeals be correct in its conclusion, the indictment is utterly insufficient to hold appellee to trial and judgment.

We submit, in conclusion, upon the question of jurisdiction, and the exercise of discretion by the Circuit Court of the United States, that the case, as presented, shows one of peculiar urgency, and brings the rights of appellee clearly within the doctrine, as laid down by this Court, in the cases cited, and in numerous other cases, which might be cited. We submit further, that the Circuit Court of the United States exercised a proper discretion in this matter, in granting the writ,

and that as to the question of jurisdiction here and now there is no room for controversy.

Stress seems to be laid by appellant upon the fact that appellee was surrendered by his sureties to the sheriff, previous to obtaining the writ. Counsel for appellant seems to think that because a defendant may be out on recognizance, or bail, that he is a free man. This is about as startling as some of the other doctrine enunciated in his brief, and is consonant with the principle which he seems to advocate between the lines that a State Court can do no wrong, while a Federal Court, at least an inferior one, can hardly ever be supposed to do right. It is no new doctrine in Texas that a defendant upon bail is constantly in a state of commitment. His custody is transferred from the law to his sureties, and upon the execution of their undertaking the sureties stand in the place and stead of the officers of the law. To them the custody of his person is delivered; they are his jailors, and during the time the recognizance is in effect, he is constantly in a state of commitment. (Gay vs. The State, 20 Tex., 507.)

This Court holds the same doctrine, and its language is to the following effect:

"When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the re-arrest by the sheriff of an escaping

prisoner. In 6 Modern it is said the bail have their principal on a string, and may pull the string whenever they please and render him in their discharge." (Taylor vs. Tainter, 16 Wall., 371.

A pertinent inquiry right here is, what business is it of the appellant, how or by what reason, or for what motive the appellant was surrendered into the custody of the law? How does it concern the State either on this hearing or on any other hearing? The giving of bail is a privilege accorded to a defendant, which he may or may not exercise at his own pleasure. He may refuse to give bail and remain in the custody of the law. Or he may determine, after giving bail, that he prefers the custody of the law, and may cause his sureties at his own instance, to return him to that custody for any reason satisfactory to himself, and with which reason the State has no concern, her only concern being that the sureties shall produce him for trial, when called for, or surrender him back into the custody of the law, from which they took him. It can be at least assumed from the record of this case, that the State had no special interest in having him surrendered into the custody of law, for it is apparent that the State never intended to bring him to trial. What did she want with him, except to hold him under the dominion and disgrace of an invalid indictment, based upon a void law? She refused to try him; refused even to place his case upon the call docket for trial; refused to take any step looking toward a trial; and he, an humble citizen, stood in the presence of the majesty of the law utterly powerless, except by pursuing the very method which was pursued, to-wit: By appealing to the Federal tribunals as an American citizen with constitutional rights guaranteed to him and invoke the protection of said Courts. If this be an offense in the eyes of the State authorities, they may make the most of it.

II.

The Act of March 30, 1889, discriminates between different citizens and classes of citizens of the State of Texas, and of the United States, and denies to certain citizens and classes of citizens the equal protection of the laws, in that it prescribes punishments, by way of felony, for certain citizens and classes for acts and omissions, which are authorized and encouraged in other citizens and classes. Such legislation is purely arbitrary, and not a proper exercise of the police power of the State, and are violative of express provisions of the Constitution of the United States.

AUTHORITIES.

G., C. & S. F. Ry. Co. vs. Ellis, 165 U. S., 150.
Duncan vs. Missouri, 152 U. S., 382.
Harding vs. People, 160 Ill., 459.
Millett vs. People, 117 Ill., 294.
Ex-P. Jentizech, (Cal.,) 32 L. R. A., 664.
State vs. Goodwill, (W. Va.,) 6 L. R. A., 621.
Frover vs. People, (Ill.,) 16 L. R. A., 492.
In re Garrabad, (Wis.,) 19 L. R. A., 858.
State vs. Loomis, 115 Mo., 307.
State vs. Inlow, 128 Mo., 163.
State vs. Walsh, (Mo. Sup. Ct.,) 37 S. W. Rep., 1112.
People vs. Marx, 99 N. Y., 377.
Wally vs. Kennedy, 2 Yerg., 555.
Vanzant vs. Waddell, 2 Yerg., 270-1.
Janes vs. Reynolds, 2 Tex., 252.
Railway vs. Wilson, (Tex.,) 19 S. W. Rep., 913.
Cooley on Cons. Lim., p. 355.
Barbier vs. Connally, 113 U. S., 27.
Yick Wo vs. Hopkins, 118 U. S., 356.
Dent vs. W. Va., 129 U. S., 114.
San Mateo vs. So. Pacific Ry. Co., 13 Fed. R., 733.

The decisions of the Supreme Court of Texas sustaining the constitutionality of this enactment were anterior to the decision by this Court, of the case of the G., C. & S. F. Ry. Co. vs. Ellis, (165 U. S., 150.) The Supreme Court of Texas proceeded upon the idea that the true test as to whether or not this statute was violative of the equality provision of the Fourteenth Amendment was this. If it was apparent that all persons of every class, upon whom the Act proposed to operate, were treated without distinction, then such legislation did not violate the Constitution of the United States. This ruling is in direct opposition to the principle laid down in the Ellis case. (165 U. S., 150.) In that case this Court used this language:

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, * * * yet it is equally true that such classification cannot be made arbitrarily. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure that equality of right which is the foundation of free government."

The Act in question is set forth in appellant's brief, pages 9 to 11, and the particular section of the Act, which, in the judgment of counsel for appellee, vitiates the whole Act, is found in section 13, which reads as follows:

"Section 13. The provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

A careful reading of the Act by the Court will demonstrate, without argument, the point intended to be presented herein by appellee. After denouncing as a felony any combination of capital, skill or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them for either, any, or all of certain enumerated purposes, such as creating or carrying out restrictions in trade, limiting or reducing the production, or increase, or reduce the price of merchandise or commodities, preventing competition in manufacture, making, transportation, sale, or purchase of merchandise, produce or commodities, fixing at a standard or figure, whereby its price to the public should be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State, or entering into, making, executing or carrying out any contract, obligation, agreement of any kind or description, by which the parties bind themselves not to sell, or dispose of, or transport any article, or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner settle the price of any article or commodity, or transportation between them or themselves, and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale, transportation of any such article or commodity, that its price might in any manner be affected; the statute proceeds to provide unusual and startling provisions for its enforcement, specifying particularly in Section 7, that in any indictment for an offense, under the Act, it was sufficient to state the pur-

pose, or effects of the trust, or combination, and that the accused was a member of it, acted with, or in pursuance of it, without giving its name, or description or how, when or where it was created. Again, in Section 8, providing that it should be sufficient in prosecutions to prove that a trust or combination existed, and that the defendant belonged to it or acted for it or in connection with it, without producing or proving any article or agreement of any written instrument; and providing further that the character of the trust or combination might be established by proof of its general reputation as such. After making these stringent general provisions with reference to combinations and trusts the statute, in Section 13, aforesaid, proceeds in practical effect and operation to exempt from its provisions all agricultural products, or live stock, while in the hands of the producer or raiser. This legislative job is a neat one, were it not for the obstacle of the Fourteenth Amendment to the Constitution of the United States. By it the political power of Texas, which is vested in the farmers and stock raisers, have said to all other classes: "We will combine with reference to our products and earnings, but you shall not do this. If you do, the gates of our penitentiaries shall open for you."

The Act is peculiarly framed, and the position is sometimes taken that the exemption does not apply to classes at all in that the farmers and stock raisers are not exempt from the operation of the Act. This argument, however, will hardly hold good in this Court, which has already laid down the principle that the purpose of a statute must be determined by its natural and reasonable effect, regardless of its language. (Henderson vs. The Mayor, etc., 92 U. S., 268); Yick Wo vs. Hopkins, 118 U. S., 373.) We must look, therefore, to the natural and reasonable effect of the exemption, in

order to determine the purpose of this statute, and from that standpoint such purpose is obvious. It must be assumed by this Court that the purpose was to give special privileges to the farmers and stockraisers; and we may add here that like privileges have since been extended to associations of laborers for the purpose of maintaining wages, by a later Act of the Legislature of the State of Texas, amendatory of this Act, approved April 30, 1895. The record in this case shows what the Court, perhaps, will take judicial knowledge of, without the evidence, that the number of farmers, planters, overseers, agricultural laborers, stock raisers, herders, drovers and laborers in the State of Texas by the census of 1890, was 470,049. (R. p. 74.) The voting population of the State is about 540,000. So, practically, 80 per cent of the people of Texas have denounced severe penalties for combinations between others, and have reserved to themseves the right to make such combinations without fear of punishment. Further comment is hardly necessary. But let us look further at the Act, from the standpoint of classification, which seems to be the last ditch of appellant's counsel, and ascertain even from that standpoint whether his contention is correct. Are all persons brought under its influence treated alike under the same conditions? Particular classes of agriculturists and stock raisers, e. g., those who deal exclusively in their own products, are favored, while those who deal in the products of others are discriminated against, no matter how honest and praiseworthy may have been the method of its accumulation. Combinations for the restraint of trade and the enhancement of prices, and the costs of necessaries of life are encouraged, while the annual fruits of the labor of all other pursuits are placed under the ban. The corn, wheat, rye, barley and vegetables, constituting the farmers yearly increase; the beef, pork and mutton of the stock raisers; and the cotton and wool in the hands of the

original producer may all be merged into a trust to the detriment and oppression of the public, whose necessaries of life depend upon these products; but the daily handiwork of the artisan and mechanic, the shoes we wear, the clothing we must procure; the products of the humble blacksmith and the carpenter; the fruits of the labor of the professional man and the manufacturer and the tradesman, are placed by these laws under the ban, and those of such crafts who may attempt to exercise the same privileges with reference to their earnings and property rights as does the farmer or stock raiser are denounced as felons, and placed in stripes. Can this be equality before the law?

A farmer who attempts to deal, by combination, with others in agricultural products taken from his neighbor in satisfaction of a debt, is denounced. The same farmer, for like practice, with his own products, is commended. What difference can there be as to his rights of property in the two cases?

The farmer who rents his land to tenants and receives as rental a portion of the crops cannot combine as to these agricultural products, because he is not the original producer. On the other hand, the farmer laborers, who receive their pay as hirelings in agricultural products, cannot combine, even among themselves; for, in that case, the land owner is the original producer. The owner of a ranch, containing thousands of cattle, may combine with the whole world and raise prices, but the herdsmen in his employ who may choose to take their pay in cattle, become criminals if they dare combine with each other, or even with the original ranch owner, for such a purpose. The cattle raiser can bring his cattle to the town to market. He can combine with the butcher without fear of punishment. But what becomes of the butcher?

These illustrations, which might be multiplied indefinitely, illustrate that appellant, in this controversy, cannot invoke the doctrine of class or class discrimination in defense of such legislation. The phraseology of the Act, and its practical operation, take it beyond the category of class, and demonstrates the viciousness of the purpose.

As a matter of fact, the legislation in question does not apply to particular bodies or associations, but to the mass of citizenship, with certain marked and favored exemptions to the producers of certain classes of property. It does not impose additional liabilities upon certain designated classes or associations, but takes from certain classes, such as merchants, manufacturers, professional men, artisans and mechanics, certain essential rights of property which are guaranteed to two or three other favored classes. All persons brought under its influence are not treated alike under the same conditions, and the legislation furnishes a remarkable instance of discrimination against, and in favor of, certain classes of *property*, the earnings of the laborer and sweat of certain classes, encouraging in some the unbridled exercise of their inalienable rights of contract, and the exercise of all rights of individual liberty as to their earnings, and forbidding, under penalties of infamous crime, a like exercise of the same rights by other classes equally meritorius and deserving of public consideration, and whose vocations are equally promotive of public benefit.

The cases cited under the proposition need no comment, but speak for themselves in absolute and unqualified condemnation of this species of legislation. It has no place in our system of laws and government, and has received the universal condemnation of the bench, Federal and State. This condemnation was established long anterior to the civil war; and the Fourteenth Amendment but emphasized that which was established

by the fathers in 1776, and by our English ancestors five centuries before at Runnymede. The State cannot deprive the citizen of this equality before the law; nor can it under the guise of police regulation, discriminate between the property rights of different citizens. It cannot by pandering to a sentiment which may already be characterized as morbid, destroy equality before the law in a pretended effort to preserve this equality. If the farmers and stock raisers, in Texas, in good faith desire to put down trusts and combinations, in restraint of trade, they must, if they would do no violence to the Constitution, place themselves and their property rights and interests on a level with those of their fellow citizens, whose avocations are not hurtful to society. They cannot put down a few trusts by encouraging the formation of numerous others, more hurtful to the body politic than the public disease they pretend to want to cure. They cannot authorize the formation of trusts in every necessity of life, in the food we eat and the clothing we wear, and thus favor the farmer and stock raiser to the detriment and oppression of other classes of our citizens. The farmer and stock raiser may be entitled to some consideration, but not to the extent of abrogating the Fourteenth Amendment. Equality before the law is a more precious privilege to the American citizen than any office which may be gained by demagogy. As said by this Court, arbitrary selection can never be justified by calling it classification. Or, as said by Mr. Justice Matthews in Yick Wo vs. Hopkins:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

No language can be more pertinent than that used by

a distinguished judge of this Court in a very early case when he sat upon the bench of a State Court:

"The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic or land, under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies, would be governed by one law; the most of the community and those who made the law, by another; whereas, a like and general law, affecting the wholé community equally, could not have been passed. The idea of a people through their representatives making laws, whereby are swept away the life, liberty and property of one of a few citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name."

Catron, J. in Wally vs. Kennedy, (2 Yerg., 555,) and Vanzant vs. Waddell, (2 Yerg., 270-271.)

Or, as said by this Court in case of Barbier vs. Connoly, 113 U. S., 27:

"These provisions are undoubted intendedly that there should be no arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcemont of contracts; that no impediment should be interposed to the pursuits of any

one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

We conclude this branch of the argument in support of the proposition made, by saying that this legislation does not come within any of the exceptions recognized by the judicial decisions of America. We do not mean to be understood as asserting that the State of Texas does not have power to subscribe regulations to promote the health, peace, morals, education and good order of its people and legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation, sometimes of a special character, having these objects in view, must obtain in certain districts, and special burdens are sometimes necessary for general benefits, such as for supplying water, preventing fires, lighting districts, clearing streets, opening parks, and many other objects. As said by the Courts, occasions for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote with as little inconvenience as possible the general good. Though in many respects necessarily special in their character, these, in proper limitations, do not furnish just grounds of complaint, if they operate alike upon all persons and property, under the same circumstances and conditions. This Court will readily understand this distinction without further argument, as they readily understand, and have so often laid down explicitly, that no State can, under the guise of its police power, contravene an express provision of

the Federal Constitution. The argument of appellant, devoted as it is upon this head, in great measure, in the attempt to maintain the doctrine that the State of Texas has the right under its police power to exact this legislation, hardly needs an answer. If the legislation in question, contravenes the equality clause of the Fourteenth Amendment, the police power of the State must give way and subordinate itself to the mandate of the organic law. That this legislation does contravene the Fourteenth Amendment, is apparent upon its reading. All property in the State is entitled to equal protection and no species of property ought to receive any special favors. The earnings of the mechanic, or of the professional man, are entitled to the same protection as the earnings of the farmer or the stock raiser; and discrimination may be as potent against the citizen in the direction ot his property as if aimed directly against himself personally. The right to hold, enjoy or sell property upon equal terms with his neighbor and to make agreements and contracts concerning it which may be believed by the owner to be for his betterment equally with such right enjoyed by his neighbor, constitute the most essential rights of American citizens. With some citizens these rights are taken away by this statute. With others they are encouraged.

The argument of appellant's counsel that the discrimination is not arbitrary or capricious because the farmers and stockholders of Texas could not combine anyway, is hardly worthy of answer in this Court, and instead of tending to obviate the constitutional objection, really tends in an opposite direction. The question is not what the farmers and stock raisers of Texas may be able to do under the privileges accorded them by this statute, but the sole question under the proposition is: "Does the statute deny to any citizen of Texas the equal protection of its laws?" If it does, it is void, and the argument *ab inconvenienti* falls to the ground.

We submit in conclusion upon this proposition that the statute does discriminate between citizens; that it does deny to certain citizens and classes of citizens the equal protection of the laws; and that the lower Court did not err in so holding.

III.

Said Act of March 30, 1889, is further violative of the Federal Constitution, in that it deprives certain citizens and classes of liberty and property without due process of law. It deprives certain citizens of the liberty of contract and prevents the enforcement of lawful contracts made; and it takes from the citizen his rights of property without due condemnation according to the course of the law of the land.

AUTHORITIES.

Slaughter House Cases, 16 Wall., 36.
" " " , 1 Abb. (U. S.,) 399.
Bertholf vs O'Reilly, 74 N. Y., 515.
People vs. Marx, 99 N. Y., 377.
People vs. Gillson, 109 N. Y., 389.
R'y Co. vs. Jacksonville, 67 Ill., 37.
Hey Sing Iech vs. Anderson, 57 Cal., 251.
Lakeview vs. Cemetery Co., 70 Ill., 192.
Match Co. vs Roeber, 106 N. Y., 473.
Chemical Co. vs. Chemical Co., 64 Fed. R., 946.
Tiedeman Police Power, pp. 223 and 224.

Section 11 of said Act reads as follows:

"That any contract or agreement in violation of the provisions of this Act shall be absolutely void and not enforceable either in law or equity."

One of the most sacred rights of liberty is the right of contract, and all rights of contract which are necessary for the carrying on of business affairs, are protected by

the Constitution, and are incapable of restraint by legislative action. This right of contract embraces the formation of business relations between citizens, and any citizen may form business relations with whom he pleases, and in the conduct of such business they have an inalienable right to fix and limit the character and amount of business they propose to transact, to select parties with whom they propose to deal, and to fix the prices at which they intend to buy or sell. As said by Tiedeman in his work on limitations of the police power:

"It is part of the national and civil liberty, to form business relations free from the dictation of the State; that a like freedom should be secured and enjoyed in determining the conditions and terms of the contracts which constitute the base of the business relation or transaction. It is therefore the general rule that a man is free to ask for his wares, or his services, whatever price he is able to get, and others are willing to pay." (p. 233.) * * * "A man has a constitutional right to buy anything in any quantity, provided he uses only fair means, and sets his own price on it, or refuses to sell it at all. And what one man may lawfully do as an individual, two or more may also do when combined as partners. Combination for business purposes is legal. Combinations are beneficial as well as injurious, according to the motives or aims with which they are formed. It is, therefore, impossible to prohibit all combination. The prohibition must rest upon the objectionable character of the object of the combination. If there is one thing more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts when entered into freely and voluntarily, shall be held sacred, and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

The constitutional privileges which protect the citizen in his liberty and property, entitle him to raise, produce, or manufacture; to increase or reduce the amount of his products; to fix and limit the prices at which he will buy and sell; to bargain with others as to prices; and to enter into all contracts usual and necessary in the ordinary avocations of production and trade. Government cannot limit these natural privileges, and any law which undertakes to abolish these rights, the exercise of which does not involve infringement upon the rights of others, or to limit their exercise in legitimate callings, is not within the police power. The Legislature cannot under pretense of exercising the police power, or under any other claim or pretense, enact laws prohibiting harmless acts, not concerning the health, safety, or welfare of society, and the Courts may examine into and annul such legislation. (67 Ill., 37; 57 Cal., 251.) If the prosecution of a particular calling or occupation threatens damage to the public or to individuals, it is a legitimate subject for public regulation, to the extent of preventing the evil; but it is strictly a judicial question whether the trade or calling is of such a nature as to require or justify police regulation. (70 Ill., 192.) It is likewise a judicial question whether the particular police regulation extends beyond the threatened evil, and prohibits that which involves no threatened danger to the public. The State certainly has the power to prescribe regulations deemed promotive of the health, peace, morals, education and good order of its people, and to so legislate as to increase industries, develop resources, and add to the general wealth and prosperity. Sometimes legislation of this character, having these objects in view, must obtain in certain districts, and special burdens are sometimes necessary to be imposed for general benefits, such as supplying water, preventing fires, lighting districts, cleaning and grading streets, opening parks and many other like objects. Occasions

for these purposes may press with more or less weight upon one than upon another, but their design is not to impose unequal and unnecessary restriction upon any one, but to promote the general good with as little inconvenience as possible. Though in many respects special and discriminative in their character, under proper limitations, they do not furnish just ground of complaint, if they operate alike upon all persons and property under similar circumstances and conditions. The State in the exercise of its police power, may sometimes exempt certain classes from the operation of a general law, but the case at bar furnishes the only instance within the knowledge of counsel for appellee, in which the State has attempted to confirm, by general law, certain privileges to favored avocations, and has denied the other classes a right to exercise such privileges. It is the first recorded instance of legislation, in which the State has said to two or three classes: "Go, combine with the world if you desire, raise prices by such combination to any figure; the higher the better; rob the customer *ad libitum* in the absolute necessities of human existence, and the greater the robbery, the better for the people. I will be a guide and a shield to you by day and by night;" and in the same breath, the State has decreed that if any one, outside the few favored classes, shall dare exercise their rights of contract with reference to property, which adheres to them as a part and parcel of their natural liberty, just as it does with the select classes, they shall be *anathema*.

These legislative acts are not addressed to the suppression of unreasonable and oppressive combination, but to any kind, reasonable or unreasonable; and such is their interpretation by the Supreme Court of Texas. They embrace combinations between two or more persons, and hence include common partnerships. They denounce alike combinations between small capital and

a minimum of skill, equally with large capital and a maximum of skill. It is made criminal for any two persons to combine as partners, corporations or otherwise, in ordinary business, to increase or reduce the price of their commodities; to fix a standard of prices; to limit or reduce the production of commodities; to limit competition between them; to make any agreement in relation to the price of an article, so as to preclude free and unrestricted competition between themselves, or between themselves and others; and to create and carry out any restrictions in trade. If marriage may be considered a business venture, as it undoubtedly is by gradual development, then is matrimony made criminal by these acts, for it certainly prevents competition between the contracting parties, even if it does not limit production. One of its objects is to reduce or increase prices and to fix standards. A and B agree to combine their capital, skill and acts in an ordinary business co-partnership for the purpose of manufacturing and dealing in certain articles. They must necessarily determine, in advance, the extent of production, and the prices at which they propose to sell, and thus fix a standard of prices, below which they agree not to sell. This is a crime under this act. They fix a figure on which they commence sales, and agree to graduate prices according to the cost of production. This is likewise a crime. In the vicissitude of trade they are compelled to lower prices in order to meet competition. This is also a crime. The cost of production may advance, to meet which, they agree to advance prices. This is a felony. Stock accumulates and trade languishes, and in order to do any business they agree to reduce prices. Again they are denounced as felons by these acts. And yet the right to combine, to form partnerships and joint stock associations, and to agree as to production and prices, is not oppressive to the public nor unjust to the individual, nor contrary to

public policy. It is an essential right, as part of the liberty of the citizen, of which no Legislature can deprive him; and that an ordinary business co-partnership is rendered criminal by this act, is apparent from the concluding portion of section 1, which forbids any two or more persons from combining together their capital, skill or acts, for the purpose of keeping any commodity at a fixed or graded figure, or by which they shall agree to unite any interest they may have in the sale or transportation of any article or commodity so that its price might, in any manner, be affected. (Sec. 1, § 5.) The same inhibition applies to members of a corporation, for such membership certainly excludes all idea of competition between individuals composing the body corporate; and yet the laws of Texas authorize the formation of corporations for numerous business purposes. Can it be that the same statute book contains a law imposing the penalty of felony upon all individuals who may enter into such associations? Corporations constitute the basis of our present economic civilization, and so permeate and control the business world, as to make their present existence an absolute necessity to mankind. Any interference with their lawful operations, by way of prohibition, infringes at once upon the liberty of the citizens, who, under legal sanction, have a right to deal with and through such agencies, and by lawful methods have made them the chief hand-maiden of an ever advancing and developing civilization. If they do wrong, they ought to be punished, but Texas ought not, at least, by a single enactment, to abolish them from the face of the earth. Restrictions in trade are not always hurtful, and competition is not always a public benefaction. Excessive competition almost invariably results in actual injury to the public. The right to combine for ordinary business purposes, and as a consequence, to fix prices and charge them according to varying conditions, and to limit or increase produc-

tion according to business exigencies, constitute, in great, part the liberty of the citizen, and legislation treads upon dangerous ground when it attempts to limit or abridge the right of private contract. Such legislation, to be valid, must always carry with it the essentiul sanction of reasonableness, and if it oversteps this established bonndary, it comes in immediate conflict with the liberty of the citizen, and sooner or later disappears from the statute book as an utterly worthless thing. This Texas act reaches the acme of absurdity by making penal any agreement for the purpose of reducing prices to the public; and all the regulations attempted are not only unreasonable in their scope and purpose, but utterly subversive of fundamental principles, and collide in their absolute recklessness with the Constitutions of both Nation and State. They should be weighed in the balances and found wanting. The property rights of citizens, not only of Texas, but of other States and of the United States, are involved in this issue. Many of them have made lawful and reasonable business contracts, upon the faith of which they have expended large sums of money, relying upon that protection in such ventures that the law always affords. To their surprise, the unreasonable provisions of this legislation have been applied to their ventures in trade, and their property has been taken from them, under section eleven of these acts, by a refusal of the Courts to enforce their contracts. They have dealt with their property as they saw citizens of Texas dealing with their property, and naturally supposed that they were living under a government of equal laws, and that they could not be deprived of their property except by due course of the law of the land. They have discovered, however, that the arbitrary provisions of these statutes, and the unconstitutional regulations enacted, are applied to them, and that their contracts have been held "absolutely void and not enforceable either in law

or equity." The Court is asked to right these wrongs and to again vindicate the liberty of the citizen from arbitrary spoliation, and to measure the same justice to an outsider that this ill considered and unconstitutional enactment guarantees to the farmers and stock raisers of Texas.

IV.

Said Act of March 30, 1894, is further violative of the Federal Constitution in that it provides that every foreign corporation (meaning thereby any corporation not incorporated by the State of Texas) violating any of the provisions of said act should be denied the right and prohibited from doing any business within the State of Texas, and it should be the duty of the Attorney-General to enforce this provision by injunction or other proper proceedings of the District Court of Travis County, in the name of the State of Texas. This provision permeates the whole statute, and being inseparable, render such statute wholly void under the Constitution.

AUTHORITIES.

Postal Telegraph Company vs. Adams, 155 U. S., 696.
Allegeyer vs. Louisiana, 165 U. S., 578.
Leisy vs. Hardin, 135 U. S., 100.
Kidd vs. Pearson, 128 U. S., 120.
Ex-Parte Asher, 128 U. S., 189.
G., C. & S. F. R'y vs. Hefley, 158 U. S., 98.
LeLoup vs. Mobile, 127 U. S., 640.
Morgan vs. Louisiana, 118 U. S., 455.
Walling vs. Michigan, 116 U. S., 446.
Mobile vs. Kimball, 102 U. S., 691.
Railway vs. Husen, 95 U. S., 465.
Henderson vs. The Mayor, etc., 92 U. S., 257.
Gibbons vs. Ogden., 9 Wheat, 195-6.
W. U. Tel. Co. vs. State, 62 Tex., 630.

Ex-Parte Towles, et al., 48 Tex., 413.
Turner vs. Eddy and Cross, 83 Tex., 218.
Dodson vs. Bunton, 81 Tex., 655.
Read vs. Levy, 30 Tex., 738.
Am. & Eng. Ency. of Law, Vol. 23, p. 225, paragraph 2.
People vs. Porter, 90 N. Y., 68.
Bittle vs. Stuart, 34 Ark., 224.
Jones vs. Jones, 104 N. Y., 234.
Black vs. Trover, 79 B. A., 123.
Dells vs. Kennedy, 49 Wis., 555.
Lathrop vs. Mills, 19 Cal., 514.
Kelley vs. State, 6 Ohio St., 269.
Black on Interpretation of Laws, p. 96 and cases cited, viz:
Warren vs. Mayer, 2 Gray, 84.
Campau vs. Detroit, 14 Mich., 276.
State vs. Dousman, 28 Wis., 541.
Slauson vs. Racine, 13 Wis., 398.
Elkhart vs. State, 5 W. Va., 515.
Willard vs. People, 5 Ill., 461.
Commonwealth vs. Potts, 79 Pa. St., 164.
State vs. Commissioners, etc., 5 Ohio St., 497.
Brooks vs. Hydorn, 76 Mich., 273.
42 N. Y. Rep., 1122.
Ex-Parte Jones, 49 Ark., 110.
Woodsworth vs. R'y Co., 18 Colo., 600.
Black on Constitutional Law, 62 and cases cited, viz:
Hinze vs. People, 92 Ill., 406.
Ex-Parte Frazer, 54 Cal., 94.
State vs. Tuttle, 53 Wis., 45.
State vs. Ernicious, 33 La. Ann., 253.
People vs. Cooper, 83 Ill., 585.
Ex-Parte Towles, 48 Tex., 413.
Santo vs. State, 2 Clark (Iowa), 165.
3 Am. & Eng. Ency. of Law, 676 et seq.
11 Am. & Eng. Ency. of Law, 368 and notes.

It is elementary that Courts are not authorized to add to or take from a statute. They can construe a statute and interpret its language so as to arrive at the legislative intent, but they cannot abolish words and phrases in a statute and say that the Legislature never really meant what it actually said. This would be an invasion of legislative prerogative, leading inevitably to judicial tyranny and arbitrary government.

Now the intent of the Legislature as manifested in Section 4, of this act, is too plain for construction. It was dealing with a subject deemed of paramount interest to the people, and the intention was to provide a prompt and drastic public remedy against any foreign corporation which should transcend the provisions of law designed to protect the people from the rapacity of trusts; and if any member of the Legislature thought of the Constitution of the United States in the passage of this act, he was wilfully ignorant or carelessly indifferent to its provisions. They were after trusts, and took no thought of hesitancy in the pursuit, or paused to weigh the safeguard thrown around State legislation by the founders of the Republic. The particular section is as follows:

"Section 4. Every foreign corporation violating any of the provisions of this act, is hereby denied the right, and prohibited from doing any business within, this State, and it shall be the duty of the Attorney-General to enforce this provision by injunction or other proper proceedings in the District Court of Travis County, in the name of the State of Texas."

Could language be more explicit? "Prohibited from doing any business within this State." Certainly this comprehends every character and class of business, including inter-state commerce. It is no answer to say that the Legislature intended only to prevent the offend-

ing corporation from doing any local business in Texas. The Legislature did not say this, but the contrary. It said that the offending corporation should not do any business in Texas, meaning thereby local or otherwise; and the duty is imposed upon the Attorney-General of the State to enforce that provision by injunction. How could the Attorney-General enforce it by injunction except by a prayer that the offending corporation should be prohibited and restrained from doing any business in Texas? Could the Attorney-General come into a Court under this section and ask the Court to enjoin the offending corporation from doing some business in Texas, to-wit: local business? Where would be his authority for such action? It would be an abandonment of the law as laid down by the legislative department of the State, and directly contrary to the terms of the statute. This being the case the infirmity of the statute cannot be relieved by construction. Its vice cannot be eliminated by holding that the Legislature did not intend to say what they actually did say and that they intended only in the enactment of the act to prohibit the foreign corporation offending against the law from doing any local business in Texas. This, we submit, would not cure the infirmity, but would render the statute ridiculous and all attempts to enforce it futile.

That this character of legislation conflicts directly with the powers of the general government under the Constitution needs neither argument nor authority. This Court has decided in a large number of cases that no State can place a restriction in any form upon inter-state commerce, either upon the commerce itself, the business of doing inter-state commerce, or the instruments and means employed to carry out such commerce. (Postal Telegraph Co. vs. Adams, 155 U. S., 688.) The right of a State to tax the franchise or privilege of a corporation has been repeatedly recognized by this Court,

and, this, whether the corporation be a domestic or a foreign corporation doing business by its permission within the State. But this Court has been equally explicit to lay down the rule that a State cannot exclude from its limits a corporation engaged in inter-state or foreign commerce or a corporation doing business with the general government, either directly in terms, or indirectly by the imposition of inadmissible conditions. (155 U. S., 696.)

In Leisy vs. Hardin, (135 U. S., 100,) which was a case involving the question of inter-state commerce directly, this Court laid down a similar doctrine, and also carefully defined the limit of the State authority touching inter-state commerce, and the powers of the general government with reference thereto. So, also, in the numerous cases cited under the proposition, this Court has taken occasion to define and limit the extent of the police power of a State, holding in every instance that this power, while it might be exercised in certain matters, could not be used by the State to affect in any manner inter-state or foreign commerce, but that under the Constitution all such powers were vested exclusively in the general government. Even as far back as Railroad Company vs. Husen, (95 U. S., 465,) this Court held that neither the unlimited power of a State to tax, nor any of its large police powers could be exercised to such an extent as to work a practical assumption of the powers conferred by the Constitution upon Congress.

We deem it unnecessary to review or to set forth the decisions of this Court upon the subject, as the principle has been so clearly and so firmly established by repeated decisions that it would be but a waste of time to discuss them here.

We have here then an instance of a State attempting by legislation to interfere with the powers of the general government in matters of inter-state commerce; and yet

we are gravely assured by counsel for appellant that there can be no constitutional objection to the statute. If Texas can exclude from her limits any corporation engaged in inter-state commerce, whom she may select as a victim, then the work of the fathers in 1787 has been in vain. The very grievance which gave rise to a convention, was the hostile action of some of the States with reference to commerce coming into their limits from other States, and without which grievance possibly we would have never had an organized and effective general government. And yet, notwithstanding the provisions of the Constitution, and its repeated exposition by this Court, the State of Texas has gravely attempted to say that whenever in her judgment some foreign corporation engaged in inter-state commerce was not doing exactly according to her liking, she would arrogate to herself the right to exclude such corporation from her limits and prohibit it from doing any business therein, either local or inter-state. This is the declaration of her statute, and this declaration we call to the attention of the Court.

If there could be any doubt as to the meaning of this Section 4, it is altogether relieved by the provisions of Section 9, of the same act, which reads as follows:

"Section 9. Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions, whether within or without the State."

Here we have also the assertion of the right on the part of the State of Texas to reach out and punish citizens of the Unined States, who never set foot upon Texas soil, and never had a transaction involving a

nickel in the State, but who upon some suspicion of an imaginary connection with a trust, formed outside of the State, Texas proposes to drag within her limits and punish him. The indictment in this case, which is set forth in the record in full, shows that the very conspiracy of which Texas proposes to take jurisdiction was a conspiracy organized in the State of New York. The indictment further shows that this conspiracy was organized for the purposes of dealing in inter-state commerce and, therefore, subject to the exclusive jurisdiction conferred upon Congress by the Constitution, and put into effective operation by the conspiracy Act of 1890. What has Texas to do with a Conspiracy organized in New York City with reference to inter-state commerce? Grant that the allegations of the indictment are true, which may be admitted simply for the sake of argument, what jurisdiction can Texas exercise over a conspiracy organized beyond her borders? The crime of conspiracy is complete without any overt act. Certainly if the alleged combination in the State of New York was not a crime against the laws of New York, Texas might well afford to let the affairs of New York alone. And if such organization or agreement was a crime against the laws of the United States, it occurs to us that the United States is competent to handle her affairs, criminal and otherwise, without the aid of any particular State, even so great a State as Texas. The power claimed and asserted in this act, if a valid exercise of constitutional power, would enable Texas to reach out her arm and crush many of the industries of other States in the American Union; to destroy property of citizens of other States; to deny rights guaranteed by the Federal Constitution to the citizens of all the States, and in effect to overturn and destroy one of the most important powers granted to the Federal Government, and without the grant of which the Union would never have existed. No exigency can excuse the attempted

usurpation of such powers. No cause can exist, no matter how potent it may occur to the legislative mind in Texas, which can authorize the State to thus override the fundamental guarantees of the Constitution of the United States. And it would comport better with the dignity of the State to preserve, protect and defend its legitimate powers under the Constitution, rather than indulge in a vain attempt to usurp other powers not legitimately belonging to it in an effort to hide behind the police power of the State.

We submit, therefore, that this proposition is clearly established by the decisions of this Court, and that Sections 4 and 9 of the act are violative of the Federal Constitution, and serve to illustrate in a manner most efficacious, the unlawful intent manifested in the statute.

We cannot conclude this argument and brief without a reference to that portion of appellant's brief which may be found on pages 65 and 66. It is a matter of regret to counsel for appellee that the distinguished counsel for appellant should endeavor in this high Court to lug into the case, as a part of his argument, some imaginary occurrence which took place in the trial of a case before the State Court at Austin, Texas, six months after this record was made up. What purpose counsel expected to subserve by these statements cannot very well be understood by counsel for appellee. These are matters *dehors* the record and have no place in this argument. This Court is not dealing with the Waters-Pierce Oil Company, nor with the Standard Oil Trust, nor with the people of Texas, nor with the State Government of Texas, nor with the Courts of Texas; it is dealing with the constitutional rights of an American citizen, and what might have taken place in the trial of some case at Austin in the summer of 1897, is totally irrelevant, if not impertinent. Counsel for appellee could very well

decline to make any reply whatever to this portion of appellant's brief. But they will take occasion here to say in direct contradiction to the statements of said brief, that it was not proven in that case that the Waters-Pierce Oil Company had entered into an agreement with various oil companies which compose the Standard Oil Trust, and that no other company in what was known as the Standard Oil Trust compete with the Waters-Pierce Oil Company in Texas in the sale of illuminating oils, nor was that fact admitted on the trial. To the contrary, it was directly proven that no such agreement had been made between the Waters-Pierce Oil Company and the Standard Oil Trust. It was also proven that the Standard Oil Trust had dissolved in 1892 and did not have a present existence. So cogent and convincing was the proof that the trial judge instructed the jury in his charge to disregard all evidence touching any agreement or combination between the Waters-Pierce Oil Company and the Standard Oil Trust, because the State of Texas had failed utterly in its evidence to establish any such combination. But, as said before, this has nothing to do with this case here, and counsel for appellee feel that they owe this Court an apology for even adverting to it.

We submit the case, and ask the Court for an affirmance of the judgment of the Circuit Court of the United States, discharging the appellee for the reasons stated in the opinion of that Court.

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No. 336.

Brief of Choate & Dodd for Appellee.

Filed Jan. 20, 1898.

Supreme Court of the United States,

October Term, 1897, No. 336.

JOHN W. BAKER, SHERIFF OF MCLENNAN COUNTY, TEXAS,
Appellant,

vs.

WM. GRICE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

ARGUMENT FOR APPELLEE.

BY JOS. H. CHOATE AND S. C. T. DODD,
Of Counsel.

EVENING POST JOB PRINTING HOUSE, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 336.

JOHN W. BAKER, Sheriff of McLennan County, Texas,
Appellant,

vs.

WM. GRICE.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

Argument for Appellee

By JOS. H. CHOATE and S. C. T. DODD, *of Counsel.*

We shall endeaver in this argument to show that the Act of March 30, 1889, of the State of Texas, makes penal all association of persons for business purposes, and renders it impossible for persons thus associated to carry on business, and that the right of persons to associate and carry on business is one of the liberties protected by the XIVth Amendment of the Federal Constitution.

We shall touch very briefly upon other unconstitutional features of this act and upon other questions arising in this case, for the reason that they will be argued fully by the able counsel with whom

we are associated, whose distance of residence prevents our joining in or pre-examining each others printed arguments, and renders probable some repetition, which will be avoided as far as possible.

The first section of the act reads as follows:

"A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations or associations of persons, or of either two or more of them, for either, any, or all of the following purposes: First, to create or carry out restrictions in trade; second, to limit or reduce the production, or increase or reduce the price of merchandise, or commodities; third, to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities; fourth, to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this State; fifth, to make or enter into, or carry out or execute any contract, obligation, or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity or article of trade, use, merchandise, commerce, or consumption, below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, or commodity, or transportation between them or themselves and others, to preclude a free and unrestricted competition, among themselves or others, in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest that they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected."

I.—The act makes criminal all association for business purposes.

We first call attention to the definition of a trust contained in this act.

"A trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of either two or more of them, for either, any, or all of the following purposes."

COMBINATION.—The word "combination" embraces every form of association and every contract by which men unite in business. The words "capital, skill or acts," also embrace every method by which men may associate for business purposes. It has been claimed that only two methods of association are known to the law, the partnership and the corporation. Certain special characteristics of these two conjoined make the joint stock association. Each or all of these methods of association are combinations of capital, skill or acts of two or more persons.

Parsons on Partnership (3d Ed., p. 6), thus defines a partnership:

"The combination by two or more persons, of capital, labor or skill, for the purpose of business for their own benefit."

In 3 Kent's Commentaries (p. 23), partnership is defined as:

"A contract of two or more competent persons to place their money, effects, labor or skill, or some or all of these in lawful commerce, or business, and to divide the profit and bear the loss in certain proportions."

In 1 Lindley on Partnership (4th Ed. p., 3), will be found a number of definitions, all agreeing that

partnership is a joinder by persons of capital, skill or acts in business, with a sharing of the common profits.

The combinations of capital, skill or acts by two or more persons, which the act condemns, includes all partnerships, corporations and associations, having in view either, any or all of certain enumerated purposes.

In order to demonstrate that the act makes criminal all association for business purposes, it is only necessary to show that one or more of the enumerated purposes is essential to every business association, whether partnership, corporation or Joint Stock Association, being so necessary a factor of the combination that the existence of the one implies the existence of the other.

PURPOSE.—This renders it necessary to consider what the law regards as a "purpose." A purpose is a mental state, an intent, a design. Every man is *prima facie* supposed to intend every necessary, or even probable or natural consequence of his own act.

"If there be infraction of the law the intention to break the law must be inferred. * * * A man must be taken to have had the intention implied from the act."

Broome's Legal Maxims, 7th Ed., p. 307.

If, for illustration, the effect of every combination is necessarily and naturally to prevent competition, the law must infer that such was the purpose of the combination, and it matters not whether this was the main purpose, a subsidiary purpose, or only a necessary consequence. As is well said in Bishop on Criminal Law, Sec. 337:

"In the affairs of life it is seldom a man does any one thing, prompted by one motive alone, to accomplish one end." * * * "Suppose, then, a

man has several intents and in pursuance of them together moving him does what the law forbids. The rule here is, that, if there are the intents necessary to constitute the offense, and intents not necessary, the latter do not vitiate the former, which in their consequences are the same as though they stood alone. Thus under the English statute against demolishing houses, if one object of a mob attacking a house is to injure a person in it; yet if another, and even inferior object is to demolish the house, the offense is committed in consequence of this inferior intent."

Hence, if the main purpose of a partnership is to carry on a business, yet if the combination of persons as partners necessarily and naturally prevents competition between them, or violates any other of the provisions of the act, that also, in contemplation of law, is a purpose of the combination.

The purpose must in any case be established by the effect. The act itself uses the word "purposes" and "effects" in the same sense. Section 7 provides that "in any indictment for an offense named in this act it is sufficient to state the *purposes* or *effects* of the trust or combination." The fifth clause of Section I. specifies one of the criminal purposes as follows: "to make and enter into, or carry out, or execute any contract"; and then follows a specification of numerous contracts which are made criminal. It is evident, then, that under this act a contract at any time entered into by a combination is to be considered one of the purposes of the combination. The mere entering into a contract by two or more persons forms a combination (for a contract is a combination), and the fact that they have made and carried out the contract is all the evidence of purpose required. *It is manifest, then, that what is made criminal by the act is the doing by two or more persons of the matters specified as purposes, and the entering into and carrying out of any of the contracts, obligations or agreements specified in clause fifth of section first.*

RESTRICTIONS IN TRADE.—The first crime specified in the act is creating or carrying out restrictions in trade.

On this we shall not dwell at this time, because "restriction of competition," hereafter to be considered, embraces all restriction of trade—and a great deal in addition. All contracts in restraint of trade are also in restriction of competition. But many contracts in restriction of competition are not contracts in restraint of trade.

We desire, at this place, to call attention to the rule of construction established in the case of the United States *vs.* The Trans-Missouri Freight Association, 166 U. S., 290.

Mr. Justice PECKHAM says, p. 327:

"It is now, with much amplification of argument, urged that the statute in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in unreasonable restraint of trade, while leaving all others unaffected by the provisions of the act; that the common law meaning of the term 'contract in restraint of trade' includes only such contracts as are in unreasonable restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

"The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years, both in England and in this country, and the term includes all kinds of those contracts which, in fact, restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade

and still be valid at common law. Although valid, it is, nevertheless, a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term contract in restraint of trade, all contracts of that nature, whether valid or otherwise, would be included and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade, or commerce, among the several States, &c., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restrainst of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

The courts both of England and America have held that many contracts in restraint of trade are reasonable, are not prejudicial to the public interest, are beneficial to the parties entering into them, and are a necessity of trade. It would be idle to cite the numerous authorities establishing these principles. We most earnestly contend that under Article XIV. of the Federal Constitution, *no State can deprive persons of their liberty of entering into contracts which are reasonable, which are not contrary to public policy, which are beneficial to the contracting parties, and a necessity of trade.* The reasons in support of this contention will appear in that portion of the argument which we now approach.

CLAUSES WHICH DEPRIVE PERSONS OF LIBERTY OF ASSOCIATION.—We now take the liberty of grouping together the prohibitions of Section First of the act which we contend absolutely deprive persons of the liberty of association in business.

I.—Creating or carrying out restrictions in trade.

II.—Preventing competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities.

III.—To make or enter into, or carry out, or execute, any contract, obligation or agreement of any kind or description by which two or more persons shall in any manner preclude a free and unrestricted competition among themselves or others in the sale or purchase of any such article or commodity.

IV.—Or by which they shall agree to pool, acquire or unite any interest that they may have in connection with the sale or transportation of any such article or commodity, that its price may in any manner be affected.

PREVENTION OF COMPETITION.—The rule of construction adopted by this Court in the Trans-Missouri Freight Association case must be applied to the statute now under consideration. When the Legislature makes criminal every association of two or more persons which precludes a free and unrestricted competition between themselves or others, it means just what the language says.

It does not mean unreasonable prevention of competition. The word "unreasonable" cannot be read into the act. It does not mean prevention of competition in general, or over the State, or over the world. It means prevention of competition on a small scale as well as on a large scale, including prevention of competition between two persons, no matter how small their trade, nor how narrow the territory affected.

The Legislature precludes all possible doubt of its meaning when it follows the general prohibition of all combinations preventing competition, by making criminal contracts between two or more persons by which they shall in any manner preclude free and unrestricted competition among themselves, or by

which they shall unite any interest they may have in connection with the sale or transportation of any article, that its price might in any manner be affected.

PARTNERSHIPS PREVENT COMPETITION.—What is competition? It is the act of striving to gain what another is striving to gain at the same time. It is rivalry in the pursuit of the same object. In business, persons who are striving to secure the same customers for the same class of goods are competitors, and the means used to secure customers is competition.

If they enter into any alliance by which they cease to be rivals, they are no longer competitors. If two who are in competition agree among themselves not to sell to the customers of the other they have restricted competition between themselves. So, also, if they agree as to the prices at which they will sell. But, more effective than all, if persons agree to unite their capital, skill or acts in cooperation in the same object and to divide the profits received, they thereby absolutely preclude competition between themselves. Instead of being rivals they become associates. Instead of each striving to obtain his ends at the expense of the other, they work in harmony for an end which will mutually benefit them. In fact, association is the antithesis of competition and all association of persons in business, whether as partners or corporators, prevents competition.

It is usual in articles of copartnership to stipulate that each partner shall devote his time and attention to the business of the firm, and shall not engage in any business in competition with the firm. This is an agreement to prevent competition, but even if no such agreement is entered into between the partners, the law implies it. "The first and highest duty which partners owe each other is that of perfect good faith. A partner must do what he can to promote the prosperity of the firm." * * * "It is quite well settled that a partner has no right to carry

away his knowledge, his skill, his capital or his credit, his care or labor into another business, whether only his own, or that of another firm, to the injury of his first copartners. That is, he may not do this in such a way as to deprive them of business, of profits or advantages, which they had a right to expect from their connection with him" (*Parsons on Part.*, 4th Ed., Sec. 153).

Undoubtedly the circumstances might be such, or the copartnership agreement such, that individuals composing the firm could legally compete with the firm, but such a case is barely conjectural. It is unusual and contrary to the true intent and purpose of a copartnership, which is co-operation and not competition.

Partnership not only prevents competition between the persons associated, but restricts competition generally. That is, it leaves fewer persons to compete, and it gives the persons combined an advantage over individuals. There is no need to argue in relation to the advantages and power of association in business. It is so marked that the business of the world is carried on by its means. It is so great, that many fear the abuse of the power, and would revert to the days of individual industry before machinery made association a necessity. It is this fear that gave rise to the law now being considered, and we are certainly in correspondence with the minds of the makers of this law when we admit that combination destroys competition between the persons combined, and restrains competition in general. The Legislators in the State of Texas did their work effectually. Believing that where "combination is possible, competition is impossible," they have utterly destroyed the power of combination. The generalization contained in the popular saying is entirely too broad, and the Legislature arguing from a false premise struck too deep and have deprived citizens of a liberty without which modern business is impossible.

There is no possible escape from the obvious and self-evident proposition that any association in business prevents competition among the persons associated, and that if prevention of competition is made criminal, association is made impossible. Prevention of competition is a purpose or effect of every copartnership, joint-stock association or corporation. It is a purpose or effect of every contract, agreement or understanding by which men associate or cooperate.

Prevent men from making contracts which preclude a free and unrestricted competition among themselves, and we are at once relegated to the savage state. If association or cooperation is forbidden, unrestricted and unrelieved warfare becomes an enforced method in business.

PREVENTION OF COMPETITION NOT CONTRARY TO PUBLIC POLICY NOR VOID AT COMMON LAW.—It now becomes necessary to meet an argument, which may be stated briefly as follows: that agreements which prevent competition are contrary to public policy and void at common law; that copartnerships were never void at common law, therefore copartnerships do not prevent competition.

The fallacy of this self-contradictory proposition is in the first premise. All agreements which prevent competition were never void at common law, being in that respect like contracts in restraint of trade, only some of which were void. And the best evidence that all agreements that prevent competition were not void is the undisputed fact that copartnerships were always upheld by law and that corporations always existed.

But this point upon which misapprehension exists to such an extent as to lead even careful judges to a misuse of language, seems to require further elaboration, although words seem powerless to make much clearer the simple proposition that copartnerships do prevent competition, and that all contracts

in prevention of competition were never void at common law.

DIFFERENCE BETWEEN DICTA OF JUDGES AND STATUTE LAW.—It is admitted that cases can be cited in which Judges, delivering opinions, have said that whatever restricts competition, or has a tendency thereto, is void. But there is a vast difference between the effect of language in a judicial opinion and the same language in a statute. The language of the one must be interpreted in its application to the facts in a particular case, while the language of the other must be interpreted according to the literal meaning of the words. Hence the common law is fluid and adaptable to circumstances, while statute law is solid and not capable of adaptation. When a court condemns restrictions of competition we study the facts of the case to learn the character of the restrictions condemned; when a statute condemns restrictions of competition it does so without qualification, without exception, without regard to circumstances, and without consideration of the reasonableness or unreasonableness of the restrictions.

HISTORY OF LAWS AGAINST COMBINATION.—Going back to the beginnings of our common law, we will find that all laws against combination because restrictive of competition were statutory, and a brief reference to these statute laws and the reason and spirit of them will serve to show that the right to form associations is a part of that liberty which cannot be safely yielded into the hands of any legislative body.

At the foundation of all the statutes against trade combinations lays the idea that prices could be regulated by law. In a brief review in the second chapter of Thorold Rogers on "The Economical Interpretation of History" it is said that laws fixing prices on wheat and beer are so old that they are undated. An example of early statutes is 37

Edw. III., which fixes the prices of poultry, regulates the diet and apparel of servants, ordains that handicraftsmen shall use but one mystery, and is also the first statute against engrossing to enhance prices.

By very early statutes local authorities were empowered to fix prices on almost all products. Many statutes were enacted regulating prices of meat and clothing. Early attention was paid to the rate of wages, because prices were supposed to be dependent upon wages. The first of the infamous Statutes of Laborers was 23 Edw. III., A. D. 1349. This punished employees for taking wages higher than those fixed by law, and employers for paying them. It also attempted to compel the sale of all manner of victual at reasonable prices. It was but natural that workmen should combine against such laws, and consequently in a new Statute of Laborers, 34 Edw. III., A. D. 1360, we find the first statute against association, in the provision that alliances, covines, congregations, chapters, ordinances and oaths made, or to be made, by masons or carpenters should be void and annulled. This provision is contained in a statute which prescribed that fugitive laborers should be branded with the letter F. The Statute of Laborers was amended and reenacted in various reigns with divers provisions against confederacies of workingmen. 3 Hen. VI., C. 1, was an act against confederacies and yearly congregations of masons in general chapters, and 15 Hen. VI., C. 6, prohibited guilds of laborers and artificers. From 23 Edw. I. to James I., thirty-seven acts against laborers were passed. All were repealed and a new one framed, 5 Eliz., C. 4. This system of infamous laws which enslaved the laborer were not finally swept from the Statute Book until 1825.

During the same periods numerous other statutes were passed fixing prices upon products, endeavoring to prevent enhancement of prices, and in some cases to prevent lowering of prices. They are too

numerous for enumeration. They will be found in "Pickering's Statutes," and many of them are referred to and quoted in an able and interesting work just published by Albert Stickney, of the New York bar, entitled "State Control of Trade and Commerce." The best known of the statutes of this character is 5 and 6 Edw. VI., C. 14, relative to forestalling, regrating and engrossing, which act created a variety of offences, even punishing such persons as were guilty of "making any motion by word, letter, message or otherwise for the enhancing of the price or dearer selling of anything or things above mentioned," and also those who got "into his or their hands by buying, contracting, or promise-taking to the intent to sell again." In relation to all of these acts, it may be said they prevented dealings by wholesale, and are utterly incompatible with modern business. They were all, some thirty-six in number, swept away by the statute 7 and 8 Vict., C. 24, with the confession that they created the evils they sought to alleviate.

The offenses of the character above enumerated, created by statutes, became known as "offenses against trade." The persons who, through a union of capital, skill or acts, produced any of the prohibited results became guilty of a conspiracy against trade. In the Law of Criminal Conspiracies and Agreements, by R. S. Wright, p. 12, n. 6, it is stated that the crime of conspiracy is statutory, and not of common law, and that the different statutory laws relative to conspiracy were enacted in aid of statutes such as enumerated, as, for instances, the various Statutes of Laborers, the Statute of 27 Edw. III., A. D. 1353, making it a felony for merchants to make "conspiracy, confederacy, covine, imagination, evil device or murmur," for the disturbance of the staples and of the price of wool, and many similar. Whether this be correct, or whether the crime of conspiracy ante-dated the statutes, it is evident that conspiracy against trade

once embraced scores of statutory offenses not now deemed illegal.

THE RIGHT TO FORM PARTNERSHIPS ALWAYS EXISTED.—And here is a point which cannot be too strongly impressed upon the judicial mind, that amid all this madness of legislation, and during the centuries when a mistaken belief prevailed that any alliances, covines or associations of persons engaged in business had the tendency to injuriously affect prices and interfere with trade, the right to form partnerships in business existed and was recognized as a common-law right. This is evident from the fact that no case has been found in which the right has been questioned. It is evident also from the few statutes by which the right was limited. Of these we have discovered only two, but it is probable there were others. The statute, 28 Geo. III., C. 53, declared it an unlawful combination for five or more persons to unite in covenant or partnership to purchase coals for sale. The statute, 17 Geo. III., C. 42, prevented combinations by copartnership, or otherwise, in the purchase or sale of bricks.

Copartnerships were therefore recognized as combinations which prevented competition and effected prices. How could it be otherwise? And yet in spite of a frenzy in relation to combinations to effect prices which Adam Smith compared to the witchcraft craze, the partnership remained unmolested. For this no other reason can be given than that the right to form partnerships was a portion of that liberty which was secured by Magna Charta, of which no freeman might be deprived. "*Nullus liber homo, &c.*" These words, says Parker, *C. J.*, in *Mitchel* vs. *Reynolds*, 1 Smith's L. C., 511, "have been always taken to extend to freedom of trade." Therefore Parliament, in its omnipotence, respected the right, and even judges affected by the prevailing craze, permitted it to exist unchallenged.

The laws relative to partnership existed, as Lord Coke said, "per legem mercatoriam," which, as hath

been said, is part of the laws of this realm for the advancement and continuance of commerce and trade, which is *pro bono publico*." And so the right of association in business continued as one of the sacred liberties of free citizens almost untouched through all those centuries in which, as Buckle says, "every European government, which legislated respecting trade, acted as if its main object was to suppress the trade and ruin the traders. Laws to regulate wages, laws to regulate prices, laws to regulate profits; interference with markets, interference with manufactories, interference with machinery, interference even with shops."

CORPORATIONS.—The long continued battle against corporations, while partnerships went unscathed, shows that it was not combinations *per se*, but peculiar methods of combination which excited legal animadversions. Corporations could only be created by king's patent, or act of Parliament, consequently there was no need of anti-corporation laws.

Most corporations were, in fact, monopolies by virtue of their charter, but corporations as such were denounced as tending to obstruct the free use of labor, as limiting competition, as putting down individual industry, and affording facilities for combinations among tradesmen for defrauding the public. The subject is discussed by Adam Smith and other political economists. But corporations vindicated their right to exist, notwithstanding these fears.

JOINT STOCK ASSOCIATIONS.—One form of partnership was condemned by law in a manner which suggests the statute under consideration; namely, a partnership with transferable shares, or a joint-stock association. The statute, 6 Geo. I., C. 18, declared associations for commercial undertakings with transferable shares to be a common nuisance, and inflicted the penalty of imprisonment for life and confiscation of goods. Even this severity of punish-

ment has been imitated in the Texas act as will hereafter be seen. This statute which is known in history as the "Infamous Bubble Act" was during its existence a dead letter, and was long ago repealed.

Joint stock associations existed in spite of it, otherwise England's rapidly developing industries could never have been carried on. Few persons were convicted under it and none were punished. The law was simply futile, says Lindley in his work on Partnership, p. 6. In fact, it is doubtful if these old statutes relative to combinations to enhance prices were ever enforced. An investigation confirms what is said by Stickney in the work above cited: "The reports of cases in the English courts show an almost entire absence of even so much as an attempt to enforce these old statutes. In time, by common consent, the statutes making such combinations criminal became obsolete. It was found by experience that they could not be enforced, and that their mere existence, with occasional sporadic attempts at enforcement, did more harm than good." The cases arising under the Bubble Act seem to be the first in which it was urged that whatever interfered with competition is contrary to law.

CASES UNDER THE BUBBLE ACT.—In *R.* vs. *Webb*, 14 East, 406, and *Pratt* vs. *Hutchinson*, 15 East, 511, it was strongly urged that the grouping together of numbers of persons, with transferable shares, for the purpose of carrying on trade, was calculated to put down individual industry and competition. It was said "if fifty persons may do this, why may not a thousand?" This argument of danger in numbers applies to an ordinary partnership as strongly as to a joint stock association. It did not prevail with the court in those cases. It is true that Lord Eldon was of the opinion that companies with large capitals, and with transferable shares, were injurious to the public and illegal, independent of the act referred to (1 Lindley on Part., 193), but this opin-

ion did not prevail, and such associations after some fluctuations of opinion were finally held to be legal unless affirmatively shown to be of a dangerous or mischievous character. 1 Lindley on Part., 194.

Thus it is evident that while the statutory law and the dicta of judges in some cases went to absurd lengths against certain forms of association, the right of association, notwithstanding the recognized and established fact that it limits competition, was never denied, and has existed under the protection of law from the days of the adoption of the law merchant until the present time. Never, either by common law nor by statute law, were all agreements in restriction of competition illegal. Such agreements were among the most ordinary and necessary in commercial life, and the right to enter into them was one of the most cherished liberties of the citizen.

The court, by Bowen, *J.*, in Mogul S. S. Co. *vs.* McGregor, 23 Q. B. D., 598, stated a principle which was always a principle of the common law, as follows: "The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse for the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence, to use a technical expression, of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would in the present day be impossible—

would be only another method of attempting to set boundaries to the tides."

This case is authority, if authority could be needed, for the proposition that combinations which restricted competition, and which prevented competition between the persons combined, never were illegal by the common law of England. This conclusion cannot be doubted when it is remembered that the statute laws of England never went to the length of preventing all association.

REVIEW OF AMERICAN CASES.--We now desire to review briefly the American cases in regard to restrictions of competition.

It will not be questioned that the right of persons to associate themselves and their capital and skill, has existed in this country from the earliest colonial times and has been exercised to a greater extent than in any other country. All the important business of the land is conducted through firms, associations and corporations. If there are cases which decide combinations in restriction of competition to be illegal, they are in direct variance with the industrial history of the country and with the statutes of all our States which authorize the creation of partnerships and corporations. But, an examination of the cases will show that it is not association *per se*, but only certain particular associations which have been condemned. The language of judges may have been broader than this, but such language must be qualified in its application to the particular facts of the cases.

The first American case in which an opinion was enunciated, which, carried to its full extent, would be fatal to association, was *Hooker* vs. *Vandewater*, 4 Denio, 349.

The court, JEWETT, *J.*, says: "It is a familiar maxim that competition is the life of trade; it follows that whatever destroys or even relaxes competition in trade, is injurious, if not fatal to it."

This is the first case in which we find this language used. The familiar maxim is ancient enough, but the conclusion that "whatever relaxes competition in trade is injurious, if not fatal, to it" seems to have been an original deduction of the judge in the case, and can hardly be accepted as conclusive either in law or economics.

The citation of authority for this language is *People* vs. *Fisher*, 14 Wend., 9. *People* vs. *Fisher* was an indictment for a conspiracy of shoe-makers to raise wages by striking, and was sustainable, if at all, on the ground that the workmen used illegal means to accomplish a legal purpose. It did not use, and was never authority for the language quoted. *Hooker* vs. *Vandewater* was the case of a pooling agreement between several individuals and firms, the proprietors of five several lines of boats on the Erie and Oswego Canals. They did not unite their capital, skill or acts. They were competitors and pooled their profits solely for the purpose of controlling or raising prices, which were to be established by agreement of all the parties interested. The language of the court must be interpreted in its application to the case, and, being so interpreted, means only that pooling agreements between competitors for the purpose of controlling prices, are contrary to public policy. This is very distinct from a combination of persons, capital, skill or acts in one firm or corporation by means of which parties cease to be competitors, and work with a joint interest.

The case of *Stanton* vs. *Allen*, 5 Denio, 434, was likewise a pooling agreement among the proprietors of boats on the Erie and Oswego Canals, by which they regulated the price of freight and passage by a uniform scale, and divided the profits according to the number of boats employed by each.

There was no common ownership of the capital employed, there was no union of persons, skill or acts. Firms which were separate remained separate and each continued to carry on its own business

separately. If the statute condemned only such agreements, not a word would be said against its constitutionality.

An early and important case, which clearly notes a diversity between combinations which destroy competition, is *Com.* vs. *Carlisle*, Brightly (Pa.), 36. That noted jurist, Judge Gibson, says: "If a number of persons should combine to establish a ferry, not from motives of public or private utility, but to ruin or injure the owner of a neighboring ferry, the wickedness of the motive would render the association criminal, although it is otherwise where capital is combined, not for the purpose of oppression, but fair competition with others of the same calling. An association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large, and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual. The combination of capital for the purposes of commerce or to carry on any other branch of industry, although it may in its consequences indirectly operate on third persons, is unaffected by this consideration, because it is a common means in the ordinary course of human affairs which stimulates to competition and enables men to engage in undertakings too weighty for an individual" (p. 40).

In the case of *Central Ohio Salt Co.* vs. *Guthrie*, 35 Ohio St., 666, thirty or more persons, firms or corporations who were and continued to be engaged separately in the manufacture of salt entered into a pooling agreement for the sole purpose of regulating prices, and for that end placed the business of receiving and distributing the salt manufactured by the different concerns under the control of five persons, to be chosen annually.

The language used by the court in regard to the restriction of competition must be interpreted with reference to the nature of the agreement, which was

a pooling agreement between competitors, and not a union of capital, skill or acts in a partnership.

The same is true of

Emery *vs.* The Ohio Candle Co., 47 Ohio St., 320;
Morris Run Coal Co. *vs.* Barclay Coal Co., 68 Pa. St., 173;
India Bagging Association *vs.* Koch & Co., 14 La. Ann., 168;
U. S. *vs.* Jellico Coal Co., 46 Fed. Rep., 432;
Lumber Co. *vs.* Hayes, 76 Cal., 387;
Craft *vs.* McConoughy, 79 Ill., 346;
Gibbs *vs.* Gas Co., 130 U. S., 396,

and many others. All were cases of contracts between competing companies which did not unite their capital, skill or acts, but only agreed as to prices and production and pooling of their receipts. As was said by SANBORN, *J.*, in U. S. *vs.* Trans-Missouri Freight Association, 58 Fed. Rep., 58: "In none of these cases were they (the courts) required to hold, and in none of them did they hold, as we understand the opinions when read in relation to the facts of the cases respectively, that every restriction of competition by contracts of competing dealers or carriers was illegal."

The learned counsel for appellant argues that it was not the intention of the Legislature to prevent partnerships and corporations, but only to prevent agreements similar to those condemned by the foregoing cases. To this we answer that in none of the foregoing cases was there a joinder of capital, skill or acts, but only an agreement in relation to production and prices between competitive firms and corporations. If that is all the Legislature intended to prevent, it has used language not only wide of the mark, but expressive, as nearly as possible, of that which was contrary to its intent. This court can only judge the intent from the language used, and will not permit the Legislature to set a net large enough to catch the innocent as well as the

guilty. A criminal statute should be plain and men should not be forced to carry on ordinary business under the shadow of felony. Neither can the plain language of the statute be escaped by the fact that the Legislature at the same session recognized and authorized the existence of partnerships and corporations. Acts are often inconsistent, and it may well be that the Legislature did not comprehend the full force and effect of the language used. If the statute, construed by its plain terms, leads to absurd and unforeseen consequences, so much the greater reason that coming under the ban of unconstitutionality it ceases to work mischief. The quoted opinion of Justice Denman, so far from being a construction of the act, is but a repetition of its language, to wit, that a trust is a combination of capital, skill or acts by two or more, and the union of capital, skill or acts denounced "is where the parties in the particular case designed the united co-operation of such agencies (to wit, persons, as well as firms and corporations), which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes." And this, as we have shown, is just what takes place when persons who might have been otherwise independent and competing, enter into partnership.

It is easy to refer to a current of cases to show that a multitude of contracts and combinations which restrict competition are legal, not taking into consideration the ordinary commercial partnership, which has never been questioned in any court, nor joint-stock associations nor corporations, which are authorized by statute in every State. It is not necessary to cite the cases which hold contracts in reasonable restriction of trade to be legal, although all such contracts are in restriction of competition. The leading case of *Mitchel* vs. *Reynolds*, 1 P. Wms., 181, held that a contract which clearly restricted competition was not illegal. A multitude of other cases will be found collected in the U. S. *vs.* Trans-Missouri Freight Association, 58 Fed. Rep., 71 and 72.

In *Marsh* vs. *Russell*, 66 N. Y., 288, a distinction between legal and illegal contracts in restriction of trade was clearly set forth as follows: "When a lawful business is carried on by a firm its members can regulate the prices at which they will buy and sell." * * * "Suppose they had formed a partnership to buy and sell wheat, how can it be doubted that they could lawfully agree in their article of copartnership that neither member of the firm should come in competition with the firm, and that wheat should not be purchased for more than a certain price, nor sold for less than a certain price? Such an agreement would certainly not upon its face be unlawful."

Parties associated for a reasonable and honest purpose may agree not to compete. *Phippen* vs. *Stickney*, 3 Met., 384.

Two firms were competitors in the business of transportation. As such they could not enter into an agreement not to compete or to fix prices. But they agreed to organize a corporation to conduct the business theretofore conducted by the competing firms. Held to be legal. *Lorillard* vs. *Clyde*, 86 N. Y., 384.

The *Central Shade Roller Co.* vs. *Cushman*, 143 Mass., 353, holds that competitors may agree to form a corporation for the purpose of preventing competition.

In *Craft* vs. *McConoughy*, 79 Ill., 346, the court points out that "a partnership had not been formed for the purpose of trading in grain, but only a secret combination to enable the parties, by secret and fraudulent means, to control the prices of grain."

In *Diamond Match Co.* vs. *Roeber*, 106 N. Y., 473, the court says: "We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the purpose of preventing competition, and the validity

of the contract, if supported by a consideration, will turn upon its reasonableness as between the parties."

"Whether competition in this particular business would be a public benefaction, or its restraint a source of prejudice, we are unable, of course, to judge. I do not think that competition is invariably a public benefaction, for it may be carried on to such a degree as to become a general evil." *Leslie* vs. *Lorillard*, 110 N. Y., 519-534.

In *Matthews* vs. *Associated Press*, 136 N. Y., 333, the defendant was a corporation organized for the purpose of collecting news for publication in the newspapers which composed its membership. It adopted a by-law prohibiting its members from receiving, or publishing, the regular news dispatches of any other news association covering a like territory and organized for a like purpose. The court held that the by-law was reasonable and valid. It said, "the greater the number belonging to the organization, the larger will be its income, and the greater amount it will be able to spend for making the collection of news, and the more efficient and valuable such collection will be. *To suppress competition in such chosen field among themselves* and to thus enhance the value of the property and the conveniences arising from the extended use of the means and opportunities of the association, it would seem most appropriate to provide that the members of such association should not take news from any other" (p. 341).

"Associations are so common an element, not only in commerce, but in all the affairs of life, that it would be rather perilous on the part of the court to assert that they impair competition, destroy emulation and diminish exertion. There is scarcely an occupation in life, scarcely a branch of trade, from the very largest to the smallest, that does not feel the exciting and invigorating influence of this wonderful instrumentality."

Jones. vs. *Fell*, 5 Fla., 510, 515.

"As a matter of fact, nearly all enterprises in this State, requiring for their execution an expenditure of large capital, are undertaken by corporations. They engage in commerce; they build and sail ships; they cover our navigable streams with steamers; they construct houses; they bring the products of earth and sea to market; they light our streets and buildings; they open and work mines; they carry water into our cities; they build railroads and cross mountains and deserts with them; they erect churches, colleges, lyceums and theatres; they set up manufactories, and keep the spindle and shuttle in motion; they establish banks for savings; they insure against accidents on land and sea; they give policies on life; they make money exchanges with all parts of the world; they publish newspapers and books, and send news by lightning across the continent and under the ocean. Indeed, there is nothing that is lawful to be done to feed and clothe our people, to beautify and adorn their dwellings, to relieve the sick, to help the needy, and to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations."

Judge Field in Railroad Tax Cases, 13 Fed. Rep., 743.

The foregoing citation of authorities is solely for the purpose of showing that which does not seem to be in need of proof, to wit, that associations restrictive of competition were not void at common law, but that on the contrary combinations restrictive of competition have always been upheld by law, and the right to combine is to be classed among the most important and least questioned liberties of the citizens. An act which makes criminal combination which prevents competition and also contracts which preclude free and unrestricted competition between the persons contracting as well as between themselves and others, absolutely prevents all associations for business purposes, including partnerships, corporations and joint-stock associations. It prevents also

a variety of other contracts such as, for instance, contracts between employer and employee, organizations of mechanics engaged in the same line of business for the purpose of maintaining wages; the appointment by two producers of the same person to sell their goods on commission; the sale of the good-will of a business with an agreement not to destroy its value by engaging in a similar business, and others of like nature.

II.—Provisions of the act which make business by associations and also by individuals impossible.

The purposes and agreements not heretofore alluded to, enumerated by the first section of the act, are as follows:

1. Those limiting or reducing the production of commodities.
2. Those increasing the price of commodities.
3. Those reducing the price of commodities.
4. Those fixing the price of commodities at any standard, or figure, whereby their price to the public shall be in any manner controlled or established.
5. Agreements not to sell or dispose of, or transport any article below a standard figure.
6. Agreements to keep the price of such articles at a fixed or graduated figure.
7. Agreements by which persons establish or settle the price of any article between themselves.
8. Agreements by which persons unite any interest in connection with any sale or transportation of any article that its price might in any manner be affected.

It is apparent by a glance at this list of prohibitions, that the act in addition to rendering association impossible also renders impossible the carrying on of business by persons associated. Associates may not limit or reduce the production of commodities in which they deal under any circumstances. They cannot have any understanding or agreement whatever in relation to the prices of commodities in which they deal. They cannot increase their prices nor reduce their prices, nor fix them at any standard, nor agree not to sell below a certain figure, nor establish or settle the price of any article between themselves. In fact they can neither agree that the prices shall remain fixed nor can they alter them. To sum up the whole matter in the language of the act, they cannot unite any interest in relation to any article which will in any manner affect its price.

But this act does more than to prevent association, and to render business by persons associated impossible, it makes business by joint tenants, copartners and joint owners impossible, and makes criminal the ordinary transaction of bargain and sale.

Joint-ownership, or ownership in common, is distinct from partnership, yet it constitutes a combination of capital. If persons are tenants in common of a farm they are owners in common of its produce. Such owners could not agree to limit or reduce their production. They could neither agree to keep their price at a fixed figure, nor agree to increase, or reduce, their prices. They could not settle the price as between themselves nor agree on anything that affected the prices to the public.

The process of buying and selling is the fixing of a price at which one is willing to part with and another to accept commodities. The contract of bargain or sale is rendered impossible if two persons cannot in any manner establish or settle the price of any article between themselves.

Or take the case suggested by the court below. A. & B. each own half a carload of potatoes and agree to ship together in order to obtain carload

rates, thus enabling them to sell lower in the markets. This is uniting their interest in such a manner as to affect the prices and is forbidden by the act.

III.—The act makes criminal combination of persons, capital, skill or acts for the purpose of reducing prices.

Multitudes of absurd consequences flow from this act, on which it is unnecessary to dwell, but one more must be mentioned because it is one which must excite astonishment in the minds of economists, legislators and men of business. *The act makes criminal association of persons, skill or acts, for the purpose of reducing prices.*

This provision of the law needs no comment. The bare statement of it is sufficient. The fact that it is a provision of a law which this court is asked to sustain, gives rise to many reflections, and will be commented upon by future historians when they attempt to account for a state of feeling existing in some portions of this country to-day, but which it is hoped will prove evanescent.

The act which fixed a penalty of life imprisonment and confiscation of goods upon the issuing of transferable shares by a partnership is known in history as "infamous."

It is hard to say, when the industrial history of this age shall be written, what term will be found severe enough to characterize this act with its accumulative penalties, amounting to life imprisonment and confiscation of property, in cases of persons who have for a month or more united their capital, skill and acts in such a manner as to reduce the price of commodities.

We do not deem it necessary to dwell upon this portion of the act, since it has been so clearly characterized by the court below. For convenience of

reference we reproduce here the language of Mr. Justice Swayne to which we refer (71 Fed. Rep., 642):

"We will assume that A and B agree to combine their capital, skill and acts, or, in other words, enter into partnership, for the purpose of manufacturing and dealing in certain commodities. They must first necessarily determine the extent of their production, and the price at which they can sell their commodities. Having determined as near as possible the cost of their manufactured products, and the minimum profit necessary to justify the carrying on of the business, they agree that they will not sell their commodities below this common-standard figure. They fix a figure on which they commence their sales, agreeing to graduate the price, up or down, as the cost of production may vary. Finding after a time their prices too high, and that competitors are underselling their commodities, they lower their prices, and this they may do solely for the purpose of holding the market against competitors. There may be, after a time, an increase in wages, and they agree to increase their prices. There comes an era of hard times, their stock accumulates and is unsalable, and they agree to limit or reduce the production of their commodities. All this they must be able to do, or they cannot carry on their business as partners, yet every one of these agreements, arrangements, undertakings or acts are made criminal by this act. It is absolutely impossible to carry on a partnership business without violating it.

"If persons combined cannot carry on business without entering into, executing and carrying out contracts, obligations and agreements by which they shall settle the prices of any article as between themselves, or thembelves and others, and bind themselves to sell their commodities at a figure, or graduated figure, and not to sell below a common standard figure, or if they cannot carry on business without raising and lowering prices, and increasing

and diminishing their productions, at pleasure, then certainly all these things are purposes of their combination. Whether these are the main purposes or purposes essential to the main purposes is not of the slightest consequence."

"The vice of the act in question is that it attempts to prevent too much; it does not stop at reasonable limits; it is not content with making criminal general restraint of trade, but it makes criminal all restrictions of trade. It is not content with affixing penalties to acts or contracts which unreasonably restrict competition; it condemns any agreement or arrangement which prevents competition between two or more persons entering into it. It not only prevents competitors from oppressing the public by unreasonable agreements as to production and prices; it also prevents persons associated in interest, joint owners and copartners, from making any agreement about their production and prices. It not only prevents persons from using their capital, skill and acts for the purpose of increasing prices; it reaches the very acme of absurdity in preventing persons from uniting their capital, skill and acts for the purpose of reducing prices. The Legislature perhaps had in mind that which might possibly be a means of public oppression, to wit, the forced reduction of prices of articles which the combination or partnership purchased, but the act does not discriminate between articles purchased and articles sold. And it is because it does not so discriminate, because of the want of ordinary care in studying the meanings of words, that we have on the statute books of Texas at this close of the nineteenth century, during which combinations of capital and skill have cheapened the price of products to an extent unparalled in the world's history, an act making it a highly penal offence for two or more persons to unite their capital and skill for the purpose of reducing the price of the products which they undertake to manufacture and sell."

IV.—Authorities on the unconstitutionality of the first section of the act.

It only remains to show by citation of authorities that the Constitution protects liberty of contract, except in so far as that liberty encroaches upon the liberty of others; that among the rights of contract thus protected is the right of men to associate together in the conduct of business, and to unite their capital, skill or acts therein; including also the right, while thus associated, to agree upon the amount of their production, and the prices at which they will buy and sell, which necessarily embraces also the right to raise and lower the prices of the commodities in which they deal, and to keep them at a fixed price.

In Allgeyer *vs.* Louisiana, 165 U.S., 578, the court, through Mr. Justice PECKHAM, says, p. 589:

"The liberty mentioned in that (XIV.) amendment means not only the right of the citizen to be free from the mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Again the learned Justice says:

"In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding or selling property, must be embraced the right to make all proper contracts in relation thereto."

It was said by Mr. Justice BRADLEY in the *Butcher's Union Co.* vs. *Crescent City Co.*, 111

U. S., 746-762, that "the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase, 'pursuit of happiness,' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen."

Again, on page 764, the learned Justice says: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." The following New York cases are important on this point:

Bertholf *vs.* O'Reilly, 74 N. Y., 509.
In re Jacobs, 98 N. Y., 98.
People *vs.* Marx, 99 N. Y., 377.
People *vs.* Gillson, 109 N. Y., 389.
Forster *vs.* Scott, 136 N. Y., 577.

In the Gilson case Mr. Justice PECKHAM, referring to the former cases, said (p. 398):

"The following propositions are firmly established and recognized; a person living under our constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit.

The term liberty, as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn

his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

There is no liberty more sacredly guarded than the right of contract. The language of *Printing Co.* vs. *Sampson*, 19 Eq. Cases, 462, has been adopted by several American courts.

"If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into, freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."

And in the *U. S. Chemical Co.* vs. *Provident Chemical Co.*, 64 Fed. Rep., 946, the Court says:

"The right to contract is a cardinal element of constitutional liberty, and as such should be jealously guarded."

The courts of many States of the Union have guarded this right of contract by declaring unconstitutional acts which infringed upon it. In Pennsylvania the statute forbidding manufacturers from paying wages in orders was held unconstitutional, as being an attempt to prevent persons *sui juris* from making their own contracts (*Godcharles* vs. *Wigeman*, 113 Pa. St., 431). The U. S. Circuit Court in Ohio declared unconstitutional a statute preventing railroad companies from contracting with employees in respect of personal injuries (*Shaver* vs. *Pa. Co.*, 71 Fed. Rep., 931). The Ohio Supreme Court held an act relating to mechanics' liens void because it interfered with the right of contract (*Palmer* vs. *Tingle*, 45 N. E. Rep., 313). In Illinois the Truck-store act, the coal-weighing act and other legislation has been set aside for the same reason.

Frorer *vs.* People, 141 Ill., 171.
Ramsey *vs.* People, 142 Ill., 380.
Harding *vs.* People, 160 Ill., 459.
Richie *vs.* People, 152 Ill., 98.

Legislation has been pronounced unconstitutional in other States on the same ground.

Kuhn *vs.* Detroit, 70 Mich., 534.
Spry Lumber Co. *vs.* Trust Co., 77 Mich., 199.
State *vs.* Loomis, 115 Mo., 307.
State *vs.* Julow, 129 Mo., 163.
State *vs.* Goodwill, 33 W. Va., 179.
Ex parte Kuback, 85 Cal., 274.
Low *vs.* Rees' Printing Co., 41 Neb., 127.
In re Eight Hour Law, 21 Col., 29.
Com. *vs.* Perry, 155 Mass., 117.

Among the rights of contract thus protected is the right of men to form business relations among themselves.

Judge Cooley says: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice" (Cooley on Torts, 278). The reverse must be equally true. A man may form business relations with whom he pleases, and in the conduct of such relations the persons thus associated may fix or limit the character and amount of their business or production, and the prices they will charge for the products which they manufacture, in which they deal or about which they contract.

In past ages the government exercised an almost unlimited power to control prices of commodities and labor, but, says Tiedeman, "Under a constitutional popular government there must necessarily be some limitation. It is a part of the natural and civil liberty to form business relations, free from the dictation of the State, that the like freedom should be secured and enjoyed in determining the condition and terms of the contract which constitutes the basis of the business relation or transaction. It is

therefore the general rule that man is free to ask for his ware or his services whatever price he is able to get and others are willing to pay" (Tiedeman's Limitations of Police Power," 233).

What one man may do individually, two or more may do when lawfully associated in business relations.

It is not denied that the Legislature, in the exercise of police power, may infringe upon the liberty of the citizen and restrict even the right of contract; but as said by Tiedeman, Limitations of Police Power, Section 1, "any law which undertakes to abolish rights, the exercise of which does not involve an infringement on the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government."

Again, on page 197, he says:

"It is also a judicial question whether the police regulations extends beyond the threatened evil and prohibits that which involves no threatening danger to the public. If it is unconstitutional to impose police regulations upon an innocent calling, it must be likewise unconstitutional to place an occupation under police restraint beyond what is necessary to dissipate the threatening evil. The Legislature has the choice of means to prevent evil to the public, but the means chosen must not go beyond the prevention of the evil, and prohibit what does not cause the evil."

All these views are well supported by authority. We need cite but few of the many cases which hold that the Legislature cannot, under the pretense of exercising the police power, or under any other claim or pretense, enact laws prohibiting harmless acts, not concerning health, safety or the welfare of

society, and the courts may examine into and annul such illegal legislation.

T. W. & W. R. Co. *vs.* Jacksonville, 67 Ill., 37.
Coe *vs.* Shultz, 47 Barb., 64.
Quintini *vs.* City of Bay St. Louis, 1 South. R., 625.
Town of Lake View *vs.* Rose Hill Co., 70 Ill., 191.
Thorpe *vs.* R. R. Co., 27 Vt., 140.
Lowry *vs.* Rainwater, 70 Mo., 152.
Jeck *vs.* Anderson, 57 Cal., 251.

In People *vs* Gillson, 109 N. Y., 389, 400, Mr. Justice PECKHAM said: "This brings us to the consideration of the question whether the act is valid as a proper exercise of what is, by way of classification, called the police power of the State. That power has never yet been fully described nor its extent plainly limited further, at least, than this; it is not above the Constitution, but it is bounded by its provisions; and if any liberty or franchise is expressly protected by any constitutional provision it cannot be destroyed by any valid exercise by the Legislature or the executive of the police power. The extent of this power has been the subject of discussion in this court, and in the recent and most important case of *In re* Jacobs (98 N. Y., 107), the question was examined and most exhaustively reviewed by Earl, *J.*, in his opinion. To reopen the subject now would be useless, and I refer to that case as authority for the statement that the Legislature cannot, without reason and arbitrarily, infringe upon the liberty or the property rights of any person within the protection of the Constitution of this State; and that if the Legislature shall determine what is a proper exercise of its police power, its decision is subject to the scrutiny of the courts."

In Colon *vs.* Lisk, 153 N. Y., 188, the Court of Appeals of New York has recently restated the

general rules laid down by the above authorities. The court said, "equal rights and impartial tribunals to enforce them are the results which are intended to be secured by the establishment of constitutional limitations to legislative power (People *vs.* Marx, 99 N. Y., 377, 387). Under the mere guise of a statute to protect against wrong, the legislature cannot arbitrarily strike down private rights and invade personal freedom or confiscate private property. The police power must be exercised within its appropriate sphere and by appropriate methods (People *vs.* Arensberg, 103 N. Y., 399). This power can be exercised only to promote the public good, and is always subject to judicial scrutiny (Forster *vs.* Scott, 136 N. Y., 577, 584). Whenever the legislature passes an act which transcends the limits of the police power it is the duty of the judiciary to pronounce it invalid and to nullify the legislative attempt to invade the citizens' rights (People *ex rel.* Nechamcus *vs.* Warden, 144 N. Y., 529, 535). That power must be exercised subject to the provisions of both the Federal and State Constitutions. Laws passed in the exercise of it must tend towards the preservation of the lives, health, morals or welfare of the community, and the court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and that the latter tend in some plain and appreciable manner towards the accomplishment of the objects for which the legislature may use this power (Health Department *vs.* Rector, 145 N. Y., 32, 39)."

Police Power and Public Policy.—The question whether the Legislature has passed the limit of its police power in enacting the law in question, may be tested by the well-known legal principle of "public policy." Public policy is a branch of police power, applied by the courts, whereby individuals are prevented from doing that which is injurious to the public, or against the public good. Individuals are forced to yield portions of their natural rights,

when the exercise of the serights interferes with the good of the public. It is sometimes said that the Legislature creates public policy. By this is meant only that the court cannot declare that to be contrary to public policy which the Legislature has legalized.

But the Legislature cannot create "public policy" in destruction of constitutional rights, nor in restriction of individual liberty, unless, in judicial opinion, such restriction is necessary for the public welfare. The validity of such laws always depends upon the question whether the enacted restrictions are demanded by public policy. We have already shown that no court has ever held it to be contrary to public policy for persons to combine their capital, skill or acts with the purpose of, or (what is the same thing) with the effect of, preventing competition. No court has ever held it to be contrary to public policy for persons to enter into agreements which preclude free and unrestricted competition among themselves. No court has ever held it to be contrary to public policy for persons to unite capital, skill and acts, for the purpose of reducing the price of commodities. No court has ever held contrary to public policy any union of interest which in any manner affects prices. No court has ever held it to be contrary to public policy for persons united in business, whether as partners or corporators, to agree among themselves as to their production, or prices, or to alter them as they may be able, or the necessities of trade may demand. On the contrary, from the days of Magna Charta, these things have been in accordance with public policy. The right to associate has been unquestioned. The right to unite capital, skill or acts has, from the earliest dawn of civilization, been free. Industry has not been carried on by unassociated individuals. Association has ever been a business necessity. Without it machinery could not have been utilized, manufactories could not have been created, commodities could not have been transported. Rail-

roads, telegraphs, steamships, mines, factories are rendered possible only by combination of capital, skill and acts, for the express purposes prohibited by the Texas act, and particularly for the purpose, and, as history proves, with the inevitable effect, of *reducing* the prices of commodities. The question of a return to individual industry involves a choice between civilization and barbarism, a choice between industry as now carried on in our commercial centres and as carried on in some of the rural and mountainous portions of our country, where as yet no combination of capital, skill or acts has taken place.

V.—The act violates the liberties of citizens of foreign States.

In enacting this law the State of Texas not only violated the liberties of its own citizens, which are protected by the Federal Constitution, it violated also the liberties of the citizens of other States.

Section 4 of the act reads as follows: "Every foreign corporation, violating any provision of this act, is hereby denied the right, and prohibited from doing any business within the State."

IT INTERFERES WITH INTERSTATE COMMERCE.—If our view of the construction of this act is correct, the mere formation of a corporation violates the act, because every corporation restricts competition. Hence the act effectually excludes all corporations of other States from doing any business whatever in Texas. Admitting that the State can prevent the formation of domestic corporations and exclude foreign corporations from its borders, this limitation must be noted, that the State has no power to exclude corporations of other States engaged in interstate commerce.

In *Crutcher* vs. *Kentucky*, 141 U. S., 47, Mr. Justice BRADLEY said:

"To carry on interstate commerce is not a franchise or a privilege granted by the State, it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States, and the accession of mere corporate facilities as a matter of convenience in carrying on their business cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

The authorities upon this point are numerous, and the question is no longer a disputable one.

Norfolk R. R. Co. *vs.* Pennsylvania, 136 U. S., 114.
McCall *vs.* California, 136 U. S., 104.
Pembina Co. *vs.* Pennsylvania, 125 U. S., 181.
Horn Silver Mining Co. *vs.* New York 143 U. S., 305.
Robbins *vs.* Shelby Taxing Dist., 120 U. S , 489.
Telegraph Co. *vs.* Texas, 105 U. S., 460.
Glouscester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196.

The attorney for appellant, in asserting that the opinion of the state court that this statute does not undertake to regulate interstate commerce is binding upon this tribunal, mistakes opinion for construction. To decide whether the act interferes with interstate commerce requires more than a construction of the statute. It requires also a construction of the Federal Constitution, a definition of interstate commerce, and a judgment as to what does and does not interfere with it. These are questions for this court in relation to which it cannot be governed by the judgment of state tribunals.

We do not dwell upon this feature, however, because the act goes so much further than the mere attempt to exclude foreign corporations. No partnership or association can carry on business of any nature in the State of Texas, except under the shadow of criminal prosecution, and the act undertakes to punish citizens of other States, not resident in the State of Texas, for forming associations or entering into any of the contracts prohibited by the act, although such contracts are legal in the State in which they were made.

IT PUNISHES ACTS COMMITTED IN OTHER STATES.—Section 9 of the act is as follows:

"Persons out of the State may commit, or be liable to indictment and conviction for committing, any of the offenses enumerated in this act, which do not, in their commission, necessarily require a personal presence in this State, *the object being to reach and punish all persons offending against its provisions, whether within or without the State.*"

ITS PENALTIES.—Section 6 of the act further provides "that any violation of any or all the provisions of this act shall be and is hereby declared a conspiracy against trade," and any person taking part in any such conspiracy as principal, manager, director, agent, servant, employee or in any other capacity, "shall be punished by a fine of not less than $50 nor more than $5,000, and by imprisonment in the penitentiary not less than one, or more than ten years, or by either such fine or imprisonment. Each day during the violation of this provision shall constitute a separate offense."

Section 10 provides a further cumulative penalty of $50 per day.

By virtue of these sections, if persons who have united their capital, skill or acts in a partnership or corporation in the State of New York, send any of their commodities into the State of Texas, and have

in that State agents, servants or employees, all of the persons thus associated, and all the agents, servants or employees, are conspirators. Each day that they conduct this business constitutes a separate offense and makes them liable to the cumulative penalties. Under this act, in the case of indictment against Grice and others, the State asserted the right to issue requisitions to bring into the State for trial, persons connected with corporations in the States of Missouri and New York who had never set foot in the State of Texas. The result of thus forcing them to indictment and trial in the State of Texas can be appreciated when it is seen that the mere forming of association and reduction of prices, insures conviction, and that the possible penalty, if business is carried on in Texas by a foreign corporation for one year, is $5,000 × 365 = $1,875,000 fine, and $50 × 365 = $18,250 forfeiture to the State, and 365 × 10 = 3,650 years imprisonment.

Conviction, too, can take place under the act without proper indictment or evidence. The 7th and 8th sections read as follows:

"7. In any indictment for an offense named in this act, it is sufficient to state the purposes or effects of the trust or combination, and that the accused was a member of, acted with, or in pursuance of it, without giving its name or description, or how, when or where it was created.

"8. In prosecutions under this act, it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonged to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such."

Furthermore, by another law of the State of Texas, persons convicted of a felony are not relieved of imprisonment pending an appeal, so that conviction under this act insures imprisonment until an appeal drags its slow length through the State, and possibly through the United States courts. It will therefore be seen that the struggle in this case is not only for the liberty of a citizen of the State of Texas, but for the liberties of the citizens of other States whom the State of Texas claims the right to convict and punish for acts legal in the State where committed.

AUTHORITIES ON ENCROACHMENTS UPON STATE SOVEREIGNTY.--It is of the utmost importance to consider the right of a State to punish citizens of other States who offend against the provisions of its laws without being personally present in the State.

Even prior to the adoption of the XIV. Amendment, there could not have been any difficulty in regard to such usurpation of authority. It is a fundamental maxim that "no State or nation can by its laws directly affect or bind persons not resident there." * * * "It would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations that one nation should be at liberty to regulate either persons, or things, not within its own territory" (Story on Conflict of Laws, Sec. 20.) Between nations such conflicts of sovereignty can only be regulated by treaty, or arms, but our Federal Constitution has failed in its design of forming a "perfect union" if it has not provided for such encroachments upon State sovereignty.

In *McCulloch* vs. *Maryland*, 4 Wheaton, 316, Chief Justice MARSHALL demonstrated that no specific provision in the Constitution was needed to keep States within their proper jurisdiction. The State of Maryland attempted to tax the bank of the United States. It was held that from the very structure of the Government the power of the State

was confined to persons and matter within its sovereignty.

"In this," says the learned Chief Justice, "we have a principle which is safe for the States and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty, from interfering powers, from a repugnancy between a right in one government to pull down what there is an acknowleged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve" (p. 430).

In *St. Louis* vs. *The Ferry Co.*, 11 Wall., 423, 430, Mr. Justice SWAYNE said: "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the Legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

In *The Railroad Co.* vs. *Jackson*, 7 Wall., 262, it was held that Pennsylvania could not tax property beyond her jurisdiction. Mr. Justice FIELD, referring to the last cited case in State Tax on Foreign Held Bonds, 15 Wall., 300, 319, says:

"The decision is nevertheless authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition."

If a State cannot interfere with property beyond its jurisdiction, still less can it interfere with the liberties of persons beyond its jurisdiction, and convict them of felony under its laws for acts com-

mitted in other States legal under the laws of the States where committed.

XIV. AMENDMENT PROTECTS ALL CITIZENS OF THE UNITED STATES AGAINST STATE USURPATION.—No specific provision in the Constitution is necessary to establish so plain a proposition, but if required it is found in the XIV. Amendment: "No State shall make or enforce any law which shall abridge any privileges or immunities of a citizen of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This provision protects the rights of every citizen of the United State against usurpation of State authority (*Slaughter*s *House Cases*, 16 Wall., 36). And in Allgeyer *v.* Louisiana, 165 U. S., 579, it was held that for one State to make criminal an agreement entered into in another State is an attempt to deprive citizens of other States of their liberty without due process of law. Mr. Justice PECKHAM says, p. 591:

"When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the State, and as such was a valid and proper contract. The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the State Legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the State to

enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution.

"In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction."

The counsel for appellant endeavors to justify this provision by reference to a narrow class of cases in which it has been held that if a person out of a state procures a crime to be committed in that state by an innocent agent, he may, if afterwards found in the state, be held as a principal, if a misdemeanor, or accessory, if a felony. Give to these cases all the latitude possible, this still must be kept in mind, that the person must be tried for the specific act he procured to be committed. The commission by an agent of one act cannot justify the punishment of the principal for another act committed in another state and legal there, yet this is what this act undertakes to do. "Any violation of any or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person taking part in such conspiracy as principal, manager, proprietor, agent, servant, employee,

or in any other capacity, shall be punished," * * * "whether within or without the state."

If A, B and C form a partnership in New York and send goods to Texas for sale they have done nothing illegal under the laws of New York or the Federal law. If their agent in Texas raises the prices of their goods, or reduces the prices or keeps them at a fixed price, he violates this law. Now, what does the State claim the right to do? Punish the New York parties as accessories to the felony of reducing prices or raising them as the case may be? By no means. It undertakes to punish them for a conspiracy against trade, and the conspiracy consists in the combination of capital, skill and acts which took place in New York by an agreement legal under the laws of that state.

IF PART UNCONSTITUTIONAL, THE ACT IS VOID.—The eminent Judge who tried this case in the court below, while holding this feature of the act clearly unconstitutional, was of the opinion that its unconstitutionality might not affect the remainder of the act. In this we think he erred. This is a penal act, and the rule that part of an act may fail and the remainder be valid has very strict limitations when applied to penal acts.

In *U. S.* vs. *Reese*, 92 U. S., 214–221, the court, by Chief Justice WAITE, says: "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not."

" It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government. The courts enforce the Legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must annul its encroachments upon the reserved power of the States and the people."

This case is quoted and followed in U. S. *vs.* Harris, 106 U. S., 629; Trade Mark Cases, 100 U. S., 82, and Baldwin *vs.* Franks, 120 U. S., 678.

But the court will not find it necessary to decide the effect of this one unconstitutional provision upon the entire act. It is so woven in warp and woof with unconstitutional provisions that nothing can be left of it but mere rags and tatters.

VI.—The act deprives citizens of the equal protection of the laws.

One other glaringly unconstitutional provision must be noticed. Having undertaken to punish persons who form associations which restrict competition, whether between themselves or themselves and others; having taken away the liberty of contract to such an extent as to render business by association impossible, and thrown the shadow of felony over the ordinary contract of bargain and sale; having inflicted the most severe punishment upon those who attempt by a union of capital,skill

or acts to decrease the price of commodities; having undertaken to punish even residents of other States for associations formed and legal contracts made in those States, the remarkable act concludes with the following section:

"Sec. 13. The provisions of this act shall not apply to agricultural products or live-stock, while in the hands of the producer or raiser."

The learned Judge in the court below found from the evidence before him that this provision exempted, on a rough estimate, four-fifths of the residents of Texas from the penalties of this act. The exemption cannot be justified upon the ground of classification, for there is here no reasonable classification.

The late case of *Gulf, Colorado & Santa Fe Co.* vs. *Ellis* (165 U. S., 150), renders it unnecessary to dwell upon former authorities. The State Court of Texas upheld on the grounds of classification the constitutionality of an act of the Legislature giving to persons successfully suing claims against railway companies for stock, killed or injured, the right to recover an attorney fee of ten dollars. It was held by this Court, reversing the Courts below, that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear not merely that a classification has been made, but also that it is found upon some reasonable ground, something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.

Mr. Justice BREWER, delivering the opinion of the Court, says (p. 155):

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection.

While, as a general proposition, this is undeniably true (Hayes *v.* Missouri, 120 U. S., 68; Railroad Co. *v.* Mackey, 127 U. S., 205; Walston *v.* Nevin, 128 U. S., 578; Bell's Gap Railroad *v.* Penn., 134 U. S., 232; Pacific Express Co. *v.* Seibert, 142 U. S., 339; Giozza *v.* Tiernan, 148 U. S., 657; Columbia South. Ry. *v.* Wright, 151 U. S., 470; Marchant v. Penn. R. R., 153 U. S., 380; St. Louis & San Francisco Ry. *v.* Mathews, 165 U. S., 1); yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

"As well said by Black, *J.*, in State *v.* Loomis, 115 Missouri, 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employees any order, check, &c., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void: 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the Legislature may fix the age at

which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.'

"In Vanzant *v.* Waddel, 2 Yerger, 260, 270, Catron, *J.* (afterwards Mr. Justice Catron of this Court), speaking for the Supreme Court of Tennessee, declared: 'Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.'

"In Dibrell *v.* Morris' Heirs, Supreme Court of Tennessee, 15 S. W. Rep., 87, 95, Baxter, Special Judge, reviewing at some length cases of classification, closes the review with these words: 'We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary.'

"In Beel's Gap Railroad *v.* Pennsylvania, 134 U. S., 232, the question was presented as to the power of the State to classify for purposes of taxation, and while it was conceded that a large discretion in these respects was vested in the various legislatures, the fact of a limit to such discretion was recognized, the Court, by Mr. Justice Bradley, saying, on page 237: 'All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature or the people of the State in framing their constitution. But clear and hostile discriminations against particular persons and classes, es-

pecially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.'

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this Court, in Yick Wo *v.* Hopkins, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declarations of principles may not have the force of organic law, or be made the base of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government" (p. 159).

The learned Justice then cites numerous decisions of State courts holding unconstitutional acts which violate the principle of equal protection, and adds:

"It must not be understood that by citing that we endorse all these decisions. Our purpose is rather to

show the extent to which the courts of the various States have gone in enforcing the constitutional obligation of equal protection. Other cases of a similar character may be found in the reports, but a mere accumulation of authorities is of little value. It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles, the statute in controversy cannot be sustained" (p. 165).

And tested by these principles, the statute *now* in controversy cannot be sustained. If associations which restrict competition and increase or reduce prices, and if agreements between associates concerning production and prices are so contrary to public policy as to justify the severe penalties of the act, no valid reason can be given why farmers and stock raisers should be exempted from like penalties. The legislative reason for the exemption is obvious. It enables a large majority of the citizens of Texas, engaged in the most important industries of the State, to reap the benefit of a liberty which is denied to a minority of the citizens of that State, and likewise to the citizens of other states engaged in interstate commerce in the State of Texas. It is a scheme to maintain prices of the principal products of Texas and to prevent maintenance of prices of other products. By virtue of the law, while agriculturists and stock raisers in Texas can combine to increase the prices of their products, purchasers cannot combine to reduce prices of the same products. This accounts for the absurd provision of the law making criminal combination of capital, skill or acts for the purpose of reducing prices. The legislators

had in view the prices of agricultural products and stock in first hands, and did not see that they struck away the very foundation stone of business prosperity. Cotton planters can combine and agree not to sell their cotton below a certain price, but two persons cannot enter into partnership to buy and sell cotton and make any agreement whatever about the price, and if manufacturers of cotton by any combination of capital, skill or acts are enabled to reduce the price of the manufactured product, they are liable to occupy a felon's cell.

So far from the classification being reasonable, it is not classification in any sense of the word. The act does not exempt agriculturists and stock raisers as a class, but only while they deal in products of their own raising. It is a classification of products, not of persons, and of products only prior to sale. The moment these products enter into commerce the exemption ceases. It is a discrimination in favor of the producer of certain products against the purchaser and consumer. It is an attempt to strike down commerce and trade in order to aid a favored class. Why should it be legal for cotton planters to form associations and make contracts of a nature which would send cotton manufacturers to a felon's cell? Unless a reasonable answer can be given to this question the act cannot be sustained. The act clearly attempts to restrict certain persons from a liberty which the mass of the community which made the law is permitted to exercise. The illegality of the exemption is so clearly shown in the case cited, and has been so ably elucidated in the opinion of the Court below, that further argument seems unnecessary.

ONLY AVAILABLE REMEDY IS THE WRIT OF HABEAS CORPUS.—ITS ALLOWANCE DISCRETIONARY.—It must be aparent to the court that if this act deprives persons of their liberty without due process of law, the only available method of preventing such illegal deprivation of liberty is by means of this *habeas*

corpus proceeding. It is admitted that the general rule is that parties being prosecuted in State courts will not be released on writ of *habeas corpus*, but will be left to reach the Supreme Court of the United States by writ of error. But it is well settled by authority that the Federal Court has jurisdiction to issue the writ and to discharge the prisoner if he be held in custody in violation of the Constitution. The question with the court is not one of jurisdiction, but of discretion. Each case will be governed by its own facts.

Ex parte Royall, 117 U. S., 241.
In re Frederich, 149 U. S., 70.
Ex parte Neagle, 135 U. S., 1.
In re Wood, 140 U. S., 278.
New York *vs.* Eno, 155 U. S., 89.
In re Belt, 159 U. S., 95.
In re Swan, 150 U. S., 637.

In *ex parte* Royall, this Court, by Mr. Justice Harlan, says: "This Court holds that where a person is in custody, under process from a State court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion whether it will discharge him, upon *habeas corpus*, in advance of his trial, in the Court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the State court shall have finally acted upon the case, the Circuit Court has still a discretion whether under all the circumstances then existing the accused, if convicted, shall be put to his writ of error from the highest Court of the State, or whether it will proceed by writ of *habeas corpus* summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States" (p. 252).

The case of Whitten *vs.* Tomlinson, 160 U. S.,

243, affirms that the Court will not exercise its discretion except in "peculiar and urgent" cases.

The character of the facts which justify the exercise of such discretion, making the case "peculiar and urgent," is well set forth by BREWER, *J.*, in *ex parte* Kieffer, 40 Fed. Rep., 399, as quoted in the opinion of the Court below. The facts which appealed to the discretion of the Circuit Judge in this case are so succinctly set forth in this opinion that no restatement of them need be made. Is it not sufficient that the defendant must suffer imprisonment during the pendency of a writ of error? If this act is unconstitutional it should be so declared by the Court at this time. Otherwise the liberty of this defendant will not be protected, for defendant being the agent of a corporation, his indictment under this act means conviction, and conviction necessitates incarceration until this case can reach the courts of the United States on writ of error. Not only the liberty of this defendant, but the liberty of thousands of other citizens of the United States will fail to be protected unless the discretionary power exercised by the Circuit Court be sustained. If Governors of Texas can be found to issue requisitions for members of corporations who never set foot within the boundaries of the State, Governors of other States will be found to honor such requisitions, and compel such citizens to stand trial in the State of Texas and suffer incarceration in its prisons until their cases can be heard and determined by the slow proceedings of a writ of error. The State Court has had its opportunity to pronounce upon this law, and finds no fault in it. The only remedy is in the United States Courts. Shall it be exercised here and now in favor of personal liberty or shall this defendant be remitted to a Texas prison to wait until the same question reaches this Court by a different process? Discretion should be exercised in favor of personal liberty and not in favor of unconstitutional laws.

We commend the language of Mr. Justice Bradley in *ex parte* Siebold, 100 U. S., 311, 376.

"An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior Court affecting it is not deemed so conclusive but that, as we have seen, the question of the Court's authority to try and imprison the party may be reviewed on *habeas corpus* by a Superior Court or Judge having authority to award the writ."

Also the language of Brewer, *J.*, in *ex parte* Kieffer, 40 Fed. Rep., 401.

"The party has a right to a speedy inquiry and determination in the Federal Court as to whether such ordinances are in conflict with the Constitution of the United States. The public as well as the individual are interested in a speedy settlement of this matter."

Nos. 336, 337, 338, 339

Add'l Brief of Johnson, Cla
& Choate for

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Jan. 27, 1898.

Nos. 336—339.

JOHN W. BAKER, SHERIFF, &c.,

vs.

WILLIAM GRICE ET AL.

ADDITIONAL AUTHORITIES AND PROPOSITIONS ON BEHALF OF APPELLEES.

I.

The court *a quo* did not err in issuing the writ of *habeas corpus*, because, if for no other reason, the Texas statute in issue (act of 1889) manifestly included and was intended to include acts of interstate commerce, and the exercise by the State of extraterritorial jurisdiction, contrary to the plain meaning and intent of the United States Constitution, and the indictment in its main count (6th) plainly charges appellees with combining in the State of New York for the purpose of shipping and selling oils in

Texas without any qualification as to local traffic. The indictment therefore charges an offense against the Sherman act of 1890, over which State courts could not exercise jurisdiction, and the remedy of appellees, according to the rules laid down by this court, was exclusively in Federal tribunals. The 6th count is plainly recognized by the court of criminal appeals of Texas as the main count of the indictment.

In re Loney, 134 U. S., 372.
Ex parte Kieffer, 40 Fed. R., 400.
Texas act 1889, par. 4, section 1.
Texas act 1889, sections 4 and 9.
Indictment, Record, p. 13 *et seq.*
Whitten *vs.* Tomlinson, 160 U. S., 231.

In the case first cited (Loney case) this court held that where a person was arrested by State authority for alleged perjury committed in a contested congressional election, it was the duty of the Federal courts to discharge on *habeas corpus*, because such charge was within the exclusive jurisdiction of the courts of the United States, and to permit it to be prosecuted in the State courts would greatly impede and embarrass the administration of justice in a national tribunal.

This case is quoted with approval in Whitten *vs.* Tomlinson (160 U. S.), and has a direct bearing and applicability to the point here presented as to jurisdiction.

II.

Under the laws of Texas a defendant charged by indictment for felony must be surrendered to the custody of the sheriff when his trial begins, and so remain until the trial ends. In case of his conviction and appeal, he is required to remain in jail pending appeal, and is not allowed bail.

These provisions appeal most strongly to the discretion of a court in granting the writ, especially when taken in connection with the exclusive jurisdiction over interstate commerce as embodied in the first proposition herein.

Wilson, Cr. Laws Texas, Art. 876 (4th ed.).

Wilson, Cr. Laws Texas, Art. 635 (4th ed.).

III.

The offense charged against appellees in the indictment is a felony, notwithstanding only a pecuniary fine may be imposed upon conviction.

Campbell *vs.* State, 22 Tex. Ct. of App., 262, 270.

IV.

The Texas courts grant writs of *habeas corpus*, even though relator may be at large,

Ex parte Coupland, 26 Tex., 388;

or out on bond;

Ex parte Trader, 24 Tex. Ct. of App., 394;

and for the purpose of testing the constitutionality of a statute,

Ex parte Mato, 19 Ct. of App., 116;

or the validity of a "local option" election;

Ex parte Kramer, 19 Ct. of App., 125;

or the validity of a city ordinance;

Ex parte Gregory, 20 Ct. of App., 210;

and said courts expressly hold that *habeas corpus* is the proper remedy to force a speedy trial.

Rutherford *vs.* State, 16 Ct. of App., 651.

These courts also hold that when the return shows a detainer under legal process, the only proper points for examination are the existence, validity, and present legal force of the process.

Ex parte Schwartz, 2 Ct. of App., 79.

Respectfully submitted.

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